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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 ANDREW BLUM and ZAQ HARRISON,
5 individually and on behalf of
6 all others similarly situated,

7 Plaintiffs,

8 v.

15 CV 1636 (GBD)

9 MERRILL LYNCH & CO., MERRILL
10 LYNCH, PIERCE, FENNER & SMITH
11 INC., and BANK OF AMERICA
12 CORPORATION,

13 Defendants.

14 -----x

15 New York, N.Y.
16 July 31, 2015
17 10:30 a.m.

18 Before:

19 HON. GEORGE B. DANIELS,

20 District Judge

21 APPEARANCES

22 OUTTEN & GOLDEN LLP
23 Attorneys for Plaintiffs
24 BY: JUSTIN M. SWARTZ
25 JUNO E. TURNER

26 MCGUIRE WOODS LLP
27 Attorneys for Defendants
28 BY: PHILIP A. GOLDSTEIN
29 MICHAEL D. MANDEL

F7v4Bluc

(In open court)

THE DEPUTY CLERK: Blum, et al. versus Merrill Lynch & Company, Incorporated, Case Number 15 CV 1636.

Will the parties please rise and make their appearance, starting with the plaintiff.

MR. SWARTZ: Good morning, your Honor. Justin Swartz from Outten & Golden for the plaintiffs, and Juno Turner is with me.

THE COURT: Good morning.

MR. MANDEL: Good morning, your Honor. Michael Mandel from McGuire Woods for the defendants.

MR. GOLDSTEIN: Good morning, your Honor. Philip Goldstein from McGuire Woods for defendants.

THE COURT: Good morning.

Two motions, the motion to dismiss and the motion for conditional certification. Who wants to be heard first?

MR. SWARTZ: We would be glad to, your Honor.

THE COURT: I will give the others the last word.

MR. SWARTZ: That's fine with us.

Your Honor, with respect to our motion, which is the motion for conditional certification, your Honor, we think that this is one of the stronger conditional certification motions that we have filed and that has been adjudicated in the Southern District of New York. The reason I say that is because we're only talking about a three-month period in a long

F7v4Bluc

1 stretch of a training program and, then beyond that, the long
2 career of financial advisors. We're talking about stage 2,
3 approximately 90 days, which the defendants admit, during which
4 the workers in question are required to follow the three-month
5 training manual. They're all subject to the exact same
6 compensation plan. They're all classified as exempt. None of
7 them are paid overtime. They all earn the same incentive
8 payments, if any. That is all that is necessary at this stage
9 of the proceeding. We have put in declarations to show that
10 they're all subject to the same alleged violation of the law.

11 One thing I want to address quickly is that the
12 defendants are incorrect, that we don't have to prove the
13 violation at this stage of the proceeding. When the defendants
14 argue that we have to show that they are subject to an unlawful
15 policy, that's not correct. We have to show they were subject
16 to the same policy that we allege is unlawful. Otherwise, that
17 would be putting the cart before the horse. We have done that.

18 We have also gone beyond that, and we have showed that
19 the plaintiffs and opt-ins so far performed substantially the
20 same duties. Now, they don't have to perform exactly the same
21 duties to prevail at this stage. In fact, a lot of courts in
22 this district have said that a factual analysis, a detailed
23 factual analysis about the duties is not even appropriate at
24 this stage. We just have to make a very small showing that
25 they're subject to the same unlawful policy, and then we do

F7v4Bluc

1 discovery, and then people opt in. We do discovery with
2 respect to those people who opt in. It wouldn't be fair at
3 this point to tell the rest of the class, you don't even get
4 notice about this case, you don't have a chance to opt in,
5 we're just going to decide that you're not similarly situated
6 to the plaintiffs before we even know who you are.

7 THE COURT: It is a little unclear to me how both
8 sides categorize what you say practically the day-to-day
9 responsibilities and activities are that are common to all of
10 these employees.

11 MR. SWARTZ: From our perspective, your Honor, I would
12 like to direct the Court's attention to Exhibit C to my
13 declaration, the Justin Swartz declaration, and that is on the
14 docket document 5-3. That is the practice management
15 development program.

16 THE COURT: Okay.

17 MR. SWARTZ: That's what governs the compensation and
18 the day-to-day activities of these people during the short
19 three-month period.

20 THE COURT: Can you, as they say, put that in English
21 for me?

22 MR. SWARTZ: Sure.

23 THE COURT: If they had to go home and explain to
24 their loved ones what they do for a living, what would they
25 say?

F7v4Bluc

1 MR. SWARTZ: They would say look at Exhibit C to my --

2 THE COURT: Exactly.

3 MR. SWARTZ: They would say they need to make a
4 minimum of 25 customer contacts per day.

5 THE COURT: What does that mean, customer contacts?
6 To do what?

7 MR. SWARTZ: It can mean cold calling, it can mean a
8 number of things, but it's not sales.

9 THE COURT: That's what I'm saying, you are both
10 trying to walk this fine line of whether it is or isn't sales.
11 They're not calling people up to say, have a nice day. There's
12 a purpose, and I assume there's a financial purpose for them to
13 contact customers, and customers means paying customers.

14 MR. SWARTZ: Absolutely.

15 THE COURT: The common day-to-day activity, what do
16 you say is the purpose of that common day-to-day activity, and
17 what do you say is to be accomplished by this day-to-day
18 activity?

19 MR. SWARTZ: I will answer all three of those
20 questions. If I can, may I just explain, the definition of
21 sales under the Federal Labor Standards Act is specific. The
22 definition of sales is defined in the statute. The gist of
23 that is a disposition from one person to another, an exchange
24 for compensation an exchange for money. That's not what these
25 folks are doing.

F7v4Bluc

1 THE COURT: They're being trained to be salespeople.

2 MR. SWARTZ: Exactly.

3 THE COURT: That's what is contemplated ultimately to
4 be their position. So I am trying to figure out what sort of
5 limbo that you say that they're supposed to be in, that they're
6 not yet salespeople but they're workers, they're supposed to
7 call people, but they're not supposed to sell them anything,
8 but they're supposed to just make contact with them. Tell me
9 how they would explain to a non-lawyer what it is they're
10 getting paid to do.

11 MR. SWARTZ: They're generating leads. They're
12 generating leads that some day may be their customers or may be
13 somebody else's customers.

14 THE COURT: What does generating leads mean?

15 MR. SWARTZ: It can mean a number of things, and
16 they're allowed to do it a number of different ways. That
17 doesn't mean their primary duty is different. Their primary
18 duty is generating leads, and that is done by making customer
19 contacts every day. It could be on the phone. It could be
20 meeting someone at a networking event. I'm going to explain
21 why that is not significant to the outside sales exemption in a
22 little bit. But it could be a number of ways. They need to
23 make a minimum of 25 customer contacts per day.

24 THE COURT: How does one generate a lead? How does
25 one accomplish that purpose?

F7v4Bluc

1 MR. SWARTZ: They can do it on the phone, cold
2 calling. They get lists. They can get it through their own
3 contacts.

4 THE COURT: How do I know when they have accomplished
5 that? What is the evidence that someone has generated a lead?

6 MR. SWARTZ: I understand the question. They add
7 those leads to a program, a computer program called
8 salesforce.com. Salesforce.com is a widely used computer
9 program that organizes leads for salespeople.

10 So they're required to identify and add 2,000
11 qualified affluent leads. That means people who have enough
12 money to salesforce.com during their period there.

13 THE COURT: How do you transform someone into a lead?

14 MR. SWARTZ: A number of ways. One would be you call
15 them on the phone and you give them a pitch and say: Would you
16 like more information about the Merrill Lynch investment
17 program? They say, yes. You say, great. You put them down.
18 They're a lead.

19 THE COURT: If they say no, they're not a lead?

20 MR. SWARTZ: I assume that to be true, but I don't
21 know for sure. They may be able to try them again some other
22 time. I don't know.

23 THE COURT: None of these stage 2 employees during
24 this 90-day period, none of them actually make a sale?

25 MR. SWARTZ: That may or may not be true. I think

F7v4Bluc

1 they're not prohibited from making sales, but that is certainly
2 not their primary duty. Their primary duty is what matters
3 under the conditional certification standard and, of course
4 under the exemptions themselves. Their primary duty is
5 generating these leads and training and learning how to be a
6 full-fledged FA.

7 THE COURT: All right. I think I understand it. I
8 just want to make sure that I can articulate it. They are
9 across the country, and they have pretty much uniform guidance
10 about what they're supposed to do. A person in New York is not
11 told that they're supposed to do their job any differently than
12 a person in California is told how they're supposed to do their
13 job. That's your position?

14 MR. SWARTZ: That's absolutely correct. That's
15 demonstrated by the documents.

16 THE COURT: Their job, from your perspective, is to
17 generate leads, and that could be done in a number of ways. It
18 can be done on the phone. It could be done in person. It
19 could be done at the office. Or it could be done outside of
20 the office.

21 MR. SWARTZ: That's correct. Defendants are correct,
22 Merrill Lynch does not stop them from varying from the standard
23 method. The standard method is sitting in the office and
24 calling the list that Merrill Lynch gives them. As Merrill
25 Lynch says, if somebody comes in and says, I used to be a used

F7v4Bluc

1 car salesman, and I have a whole network of people, that I'm
2 going to pick up the phone and call my network. Merrill
3 doesn't stop them from doing that. They have to generate the
4 leads.

5 THE COURT: If they say, I know a lot of people who I
6 play basketball with on Tuesday night, I'll go out, and when
7 I'm playing basketball with them, I'll take a bunch of cards
8 with me, and I will give a few people a pitch.

9 MR. SWARTZ: That's correct, and they're not required
10 to sell anything. "Sell" has a specific definition under the
11 FLSA.

12 THE COURT: Their job during this period is not
13 defined as requiring them to make a sale.

14 MR. SWARTZ: That's right, they're not required to.
15 They may not be prohibited from doing that. That is above and
16 beyond. That's not part of their primary duty. What matters
17 is the primary duty under the FSLA.

18 THE COURT: What do you say, from your knowledge of
19 what they're primarily involved in, are most people making
20 sales?

21 MR. SWARTZ: Not from our experience. Not from the
22 experience of the declarations that defendants submitted.

23 THE COURT: Okay.

24 MR. SWARTZ: Again, your Honor, we're talking about a
25 five-stage program that lasts a little bit less than four

F7v4Bluc

1 years. So this is the very beginning of these people's
2 careers. In the first four months, they're non-exempt
3 employees, studying for their Series 7 exams. Reiburn v.
4 Merrill Lynch case, which was just transferred to your Honor,
5 challenges the unpaid overtime at that stage. This case
6 involves the next three months. That's four months. This
7 involves the next three months, during which they are still
8 training, and they're just getting their feet wet with respect
9 to talking to new customers, potential customers, leads.

10 THE COURT: What's the difference between their job
11 during this 90-day period and how you define their job after
12 the 90 days?

13 MR. SWARTZ: After the 90-day period, there are three
14 more stages. Those are called stage 1, stage 2, and stage 3.
15 During those stages, then they start having sales goals. Then
16 they're expected to sell. They're expected to produce income
17 for Merrill Lynch. They do that by selling mutual funds,
18 generating commissions off of stock sales, just like a typical
19 stockbroker, but they're in a structured program for the first
20 three years of being a stockbroker. They're not just thrown
21 out on their own.

22 After stage 3, after that three and change years of
23 training, then they're full-fledged stockbrokers, they're out
24 there on their own. We're not challenging those practices at
25 all. In some cases in this court and others, the Liddy case,

F7v4Bluc

1 in particular, the one that was in California, they challenged
2 the exempt status and overtime protections and deductions for
3 stockbrokers all the way from year 4, which is when they become
4 a full-fledged stockbroker, through year 40, when they have a
5 hundred million dollar book of business and they're just
6 watching the money roll in.

7 This is something very different. This is a very
8 narrow stretch of their career, this three-month period where
9 they're told to generate leads, they're told how many leads to
10 generate. They're given a way of generating the leads, which
11 is calling these lists. They can also generate leads another
12 way, but they're still generating leads. They are also
13 training. They're still learning how to do this job. They're
14 not doing the job yet. They're not doing the sales yet. When
15 we say inside sales in our complaint, what we're talking about
16 is this lead generation. This is where they are on the phone,
17 calling people, saying: Would you like me to send you a
18 booklet?

19 THE COURT: What do you say is the minimum job
20 requirement or activity that a person is supposed to be engaged
21 in?

22 MR. SWARTZ: The minimum?

23 THE COURT: Yes. How do you judge whether or not they
24 are meeting the responsibilities of the job?

25 MR. SWARTZ: Those goals are clearly set forth in the

F7v4Bluc

1 practice management development program that applies to
2 everybody. They must make a minimum of 25 customer contacts
3 per day.

4 THE COURT: Where are you reading from?

5 MR. SWARTZ: I believe it is on page 4.

6 THE COURT: Of the?

7 MR. SWARTZ: On the docket, it is ECF 5-3.

8 THE COURT: Your declaration?

9 MR. SWARTZ: Exhibit C to my declaration.

10 THE COURT: Okay. The practice management development
11 program?

12 MR. SWARTZ: That's correct.

13 THE COURT: Where were you reading from?

14 MR. SWARTZ: I'm looking at page 4. The bottom
15 right-hand corner has the page number.

16 THE COURT: Page 4.

17 MR. SWARTZ: There are bullet points in the middle of
18 the page, five bullet points, under the heading PMD,
19 development stage.

20 THE COURT: The PM development stage is the three
21 months, you're dealing only with employees who are engaged in
22 the PMD three-month development stage.

23 MR. SWARTZ: That's correct. We're not attempting to
24 include anybody else in the collective, just people who were in
25 that period, in that stage, the three-month period, within the

F7v4Bluc

1 last three years.

2 THE COURT: So you were quoting from the bullet
3 points?

4 MR. SWARTZ: That's correct.

5 THE COURT: Make a minimum of 25 contacts per day,
6 spend at least seven hours per day in contact with potential
7 clients, to set and host at least eight financial profiling
8 appointments per week. What does that mean?

9 MR. SWARTZ: That means that they should invite people
10 in and gather information from those people. They're still not
11 selling. For instance, if somebody who has graduated from
12 college and has their first job might get a phone call from
13 someone at Merrill, one of our clients, and that person might
14 say to the recent graduate: Look, you have a great job.
15 You're going to have some money. You're going to need to
16 invest. Come in and let's talk about your goals.

17 Then, Merrill has a computer program that tells them
18 what questions to ask.

19 THE COURT: That is an in-office appointment?

20 MR. SWARTZ: Yes, in the office.

21 THE COURT: And identify and add 2,000 qualified
22 affluent leads. Identify 100 prospects in the immediate
23 pipeline.

24 Just for my understanding, the purpose of generating
25 and recording these leads, what is supposed to happen with that

F7v4Bluc

1 information after it is accumulated?

2 MR. SWARTZ: The qualified affluent leads goes into
3 the database called salesforce.com. Our understanding from our
4 clients, our client's understanding is that those leads then
5 can be called on by either our clients, when they graduate to
6 the first stage of the PMD program, stage 1, where they're real
7 salespeople, or they may be called on by other people. They go
8 into the general hoppers of Merrill Lynch. They become warm
9 leads as opposed to cold calls.

10 THE COURT: How do you know if somebody is a lead?
11 They have expressed what kind of an interest?

12 MR. SWARTZ: There are different kinds of leads. Our
13 clients start off with a list of cold leads. If they express
14 some interest, if they say: We would like to hear more, please
15 send me a booklet. Sure, I'll come in and do a profile. I
16 guess that is the rarest one --

17 THE COURT: You say they have to generate leads. If
18 you call me, how do I know that you generated a lead? What do
19 I have to respond?

20 MR. SWARTZ: Express some interest. Ideally, you
21 would come in and be one of my eight financial profiles. You
22 can also say: Sure. Send me some information. Let's set up
23 another call.

24 It has to be something affirmative that will allow
25 them to change you from a cold lead, who nobody knows whether

F7v4Bluc

1 they have any interest, and distinguish it from someone who
2 says: You know what, I'm already taken care of.

3 THE COURT: What is the difference between that and
4 identifying and adding 2,000 qualified affluent leads? I
5 assume that is not personal contacts.

6 MR. SWARTZ: It could be.

7 THE COURT: Not 2,000 personal contacts.

8 MR. SWARTZ: Not usually.

9 THE COURT: That is just sort of, you know, going to
10 databases and looking up who has got money?

11 MR. SWARTZ: Well, Merrill provides that to these
12 workers.

13 THE COURT: It says their job is to identify and add
14 2,000 qualified --

15 MR. SWARTZ: Merrill gives them lists of potentials,
16 but Merrill doesn't necessarily know how much money someone has
17 or whether they're qualified in any other way. You have to
18 call, develop a rapport, say: Hello. I'm a financial advisor
19 trainee. I would like to talk to you about Merrill products.
20 Then you get talking to them and you find out how much money
21 they have, you find out whether they're qualified in other
22 respects, and then they become a qualified affluent lead.

23 THE COURT: Identify and add 2,000 qualified affluent
24 leads requires some sort of personal contact with those 2,000
25 people?

F7v4Bluc

1 MR. SWARTZ: Over the phone or it could be done in
2 person.

3 THE COURT: That is not pulling together some kind of
4 list of names that you pull --

5 MR. SWARTZ: For the most part, Merrill has already
6 done that. They have pulled together this list of names that
7 is at least a list of names.

8 THE COURT: They're not starting out generating the
9 names. They're trying to take the names that are given to them
10 and trying to generate some interest, minor or major, on behalf
11 of the name that they were given.

12 MR. SWARTZ: To be clear, they're not prohibited from
13 going off list, but that is not a primary duty of the job.

14 THE COURT: What does it mean to identify 100
15 prospects in immediate pipeline?

16 MR. SWARTZ: I will have to talk to my clients more
17 about that one. I don't know exactly what that means.

18 THE COURT: So at this point, what is usually the
19 number of employees at any one time that is in this three-month
20 period?

21 MR. SWARTZ: I don't know, your Honor. It is in the
22 thousands, I'm pretty sure, but I think Mr. Mandel will
23 probably have a better answer.

24 THE COURT: All right.

25 MR. SWARTZ: So with respect to the primary duties, as

F7v4Bluc

1 I said, this describes it. They also are training, they're
2 learning. They are part of a training course that they're
3 still involved in.

4 They're also not doing something that is important for
5 the outside sales exemption. One of the things that the
6 defendants failed to mention, gloss over, with respect to
7 outside sales is you're not an outside salesperson just because
8 you leave the office and perform some sales. You're an outside
9 salesperson if you leave the office and go to the customer's
10 place of business or the customer's home. That's clear in the
11 regulation.

12 I'm moving over to the motion to dismiss a little bit
13 but it overlaps because it is the same for everybody. In our
14 complaint, we do note that some of the overtime that they work
15 is caused by going to networking functions after work. Those
16 networking functions are not at people's homes. Those
17 networking functions are not at people's places of business.

18 THE COURT: You say not people's --

19 MR. SWARTZ: Not at the customer's places of business.
20 So that is a key element to the outside sales exemption. A lot
21 of times there's loose language in opinions or sometimes
22 defendants sort of gloss over it, like they have here. A
23 classic outside salesperson is a vacuum cleaner salesperson.
24 They go to the person's home, try to make a sale. Or somebody
25 who sells office supplies, they go to the customer's place of

F7v4Bluc

1 business and try to make a sale. That is what the exemption
2 was designed for, and that's what is required for the
3 exemption. Just because you leave the office to do something
4 doesn't mean you're an outside salesperson. That's a key
5 element.

6 THE COURT: Isn't being an outside salesperson that
7 your primary responsibility and the form in which you meet
8 those responsibilities is to generate sales, and you do not
9 primarily do that from the employer's location?

10 MR. SWARTZ: No. Your Honor, with respect, that is an
11 over simplification of it.

12 THE COURT: How complicated are you trying to make it?

13 MR. SWARTZ: I'm trying to make it just complicated
14 enough for us to win.

15 THE COURT: That's the most candid answer.

16 MR. SWARTZ: It is really not that complicated. It is
17 not just you're not doing it from the employer's place of
18 business; it's that you're doing it at the customer's home or
19 place of business.

20 THE COURT: I'm not sure I agree with that. I could
21 technically be an outside salesperson if I had my own office
22 someplace else or if I worked out of my home.

23 MR. SWARTZ: If you worked out of your home --

24 THE COURT: If I was cold calling from my home, I
25 could qualify as an outside salesperson.

F7v4Bluc

1 MR. SWARTZ: Your Honor, with respect, I don't think
2 that's correct. Let's say you're working for Merrill Lynch and
3 your job is to sit in your home and make these calls. Under
4 the regulations and the case law, your home becomes one of
5 Merrill Lynch's place of business.

6 I had a case, for instance, we represented Medicaid
7 marketing reps. These are the folks who work out of these
8 mobile vans that drive around the city and park in a place for
9 a day and try to sign people up for Medicare managed care.
10 Those vans that drove around the city, those were the
11 employer's place of business for that day. The employer's
12 place of business can move from place to place, and it can also
13 be somebody's home. The fact that you're not at the
14 headquarters or at the office doesn't mean you're an outside
15 salesperson. To be an outside salesperson, you have to be
16 doing sales and you have to be doing it to the customer at the
17 customer's place of business or at the customer's home.

18 THE COURT: Where does it say that?

19 MR. SWARTZ: That is 29 CFR 541.502.

20 THE COURT: Quote the language.

21 MR. SWARTZ: The language is, they must be engaged at
22 the customer's place of business or . . . at the customer's
23 home.

24 That's on page 19 of our memorandum in opposition to
25 their motion to dismiss.

F7v4Bluc

1 That is an important part of the outside sales
2 exemption that that must be proved by the defendants. That is
3 not something that we alleged in our complaint because, first
4 of all, it is not true. They didn't go to the customer's homes
5 or the customer's place of business.

6 THE COURT: You say page 19?

7 MR. SWARTZ: Page 19 of our brief, which is docket
8 number 37.

9 THE COURT: All right.

10 MR. SWARTZ: Your Honor, this whole discussion, which
11 I'm perfectly glad to have, is material outside the pleadings.
12 It underscores the reason that a motion to dismiss on exemption
13 grounds at this stage is premature.

14 Defendants didn't cite any case where a lawsuit was
15 dismissed based on FLSA exemptions at the pleading stage, and
16 for good reason. This whole conversation, I think, is one
17 indication of why that is not appropriate. There is so much
18 that needs to be proved as opposed to me just telling you my
19 understanding from talking to my clients about it.

20 Second of all, the definition of "sales" is specific
21 in the FLSA. It is part of the statute. Both sides, as I
22 think your Honor noted, are using the word "sales" pretty
23 loosely. And the defendants, on the other hand, are saying
24 that the primary duty is sales, so they're entitled to the
25 outside sales exemption. And then, on the other hand, if you

F7v4Bluc

1 look at their argument with respect to the administrative
2 exemption, which in our view is even more farfetched, they sort
3 of dance around the idea and don't really say "sales" for a
4 good reason. Because if your primary duty is sales, you can't
5 be administratively exempt in this circuit, full stop.

6 There's a case that we didn't cite in our papers, but
7 it's a controlling case called Reiseck v. Universal
8 Communications. And that clearly says that sales, if your
9 primary duty is sales, that's on the production side of the
10 administrative/production dichotomy. If you're on the
11 production side, that means you're not an administratively
12 exempt person.

13 Again, it is not our burden to prove. It is the
14 defendant's burden to prove. These exemptions are supposed to
15 be construed very narrowly. They have to prove every element
16 clearly and unmistakably. They certainly can't do that on our
17 pleadings. The fact that they haven't even answered yet and
18 taken a position about what the primary duty of these folks is,
19 is another reason that a motion to dismiss is inappropriate at
20 this stage.

21 Getting back to the conditional certification motion,
22 which we think the Court should grant, the same conversation
23 that I just had is relevant to that motion because what we need
24 to do at this point is get people notice about the case, let
25 them know that their statute of limitations are going to start

F7v4Bluc

1 ticking at some point. Get notice to them. Let them join the
2 case and then become part of the discovery.

3 The defendants put in a bunch of declarations saying
4 some things that helped them, some things that helped us. We
5 haven't deposed any of those people. They haven't deposed any
6 of the people who are going to join the case. That's the
7 second stage. That's why there are two stages. The first
8 stage is for people to find out about the case, to join the
9 case, and then they become the collective. Then, you compare
10 them to the named plaintiffs to determine whether they're
11 similarly situated. You can't compare them to the named
12 plaintiffs to determine whether they are similarly situated
13 until they join the case and say, I would like to be part of
14 this. That is the reason for this two-stage process, and
15 that's an important reason that the early stage of this
16 proceeding dictates the motion to dismiss should be denied and
17 that the motion for conditional certification be granted.

18 THE COURT: Thank you.

19 Let me hear from the other side.

20 MR. MANDEL: Thank you, your Honor. Michael Mandel
21 for the defendants.

22 Let me start off by saying I'm a little surprised to
23 hear counsel say that what the work that these plaintiffs were
24 doing is not sales, because if you look at their reply brief,
25 which is at docket number 82, at page 3, footnote 3, it

F7v4Bluc

1 specifically says, plaintiffs do not dispute that selling
2 financial products was among their primary duties. They have
3 acknowledged that. Sales is one of their primary duties. From
4 our perspective, it is a non-issue with respect to the motion
5 to dismiss that sales is one of their primary duties.

6 THE COURT: Are they required to make sales?

7 MR. MANDEL: That is part of their job, yes.

8 THE COURT: They are required to make a sale?

9 MR. MANDEL: Yes.

10 THE COURT: Where is that in their job description?
11 And what is the minimum requirement with regard to sales?

12 MR. MANDEL: At the development stage for these
13 financial advisors, there is no minimum sales or production
14 requirement. That's why in this first 90 days they're not
15 given any minimum because they're just getting on their feet,
16 they are just developing business.

17 THE COURT: Do they have to make at least one sale?

18 MR. MANDEL: They do not.

19 THE COURT: All right. So their job isn't to make
20 sales. That's not what they are being paid for.

21 MR. MANDEL: Well, that may be true. But to
22 Mr. Swartz's point, we're talking about a motion to dismiss.
23 We're talking about the pleadings. The plaintiffs have alleged
24 that their primary duty is sales, and they have reaffirmed that
25 in their own reply brief in support of their motion for

F7v4Bluc

1 conditional certification. For purposes of the motion to
2 dismiss, it is undisputed that at least one of their primary
3 duties is sales. The only issue then is, are they customarily
4 and regularly performing those duties away from their
5 employer's place of business.

6 THE COURT: What do you say is the volume and amount
7 of sales that you say is involved in this job?

8 MR. MANDEL: I'm not sure I understand the question,
9 your Honor.

10 THE COURT: I assume that you're not arguing that
11 their primary job responsibility is to make a sale.

12 MR. MANDEL: That is correct, your Honor.

13 THE COURT: Okay. You're not even arguing that the
14 majority of their time is supposed to be spent on trying to
15 make sales.

16 MR. MANDEL: It is not necessarily supposed to be, but
17 as reflected in some of the evidence, that can be the case for
18 some people.

19 THE COURT: Where in the job responsibilities does it
20 articulate that their job is to make sales?

21 MR. MANDEL: Well, that isn't articulated as one of
22 their responsibilities. Their ultimate responsibility, their
23 expected primary duty is to provide financial planning advice
24 and consultation to clients.

25 THE COURT: Okay.

F7v4Bluc

1 MR. MANDEL: In order to get those clients, that's
2 where the lead generation and the sales work comes in, trying
3 to identify clients, have those clients then retain you for
4 your services.

5 THE COURT: Not during this 90-day period.

6 MR. MANDEL: No, during that 90-day period.

7 THE COURT: Well, you both have me in sort of a limbo
8 here. Where am I supposed to look to see that their
9 responsibilities, their job responsibilities, are primarily
10 sales? I didn't hear you arguing that.

11 MR. MANDEL: For purposes of the motion to dismiss, I
12 have pointed you to it, plaintiff's own admission in their
13 reply brief at the section that I cited. They specifically say
14 their primary duty is sales.

15 THE COURT: That's not what they're saying now.

16 MR. MANDEL: That's what their papers say.

17 THE COURT: That's not what their complaint says.

18 MR. MANDEL: The complaint does say that one of their
19 primary duties is sales. They're just claiming that it's
20 inside sales, not outside sales.

21 THE COURT: As they say, there's rhetoric and then
22 there's reality. I'm trying to understand where the genuine
23 dispute lies. You can't simply rely on their appropriate or
24 inappropriate characterization in their brief. When I ask you,
25 in fact, what is the reality, you have to tell me that that's

F7v4Bluc

1 an accurate statement. But you seem to be trying to charge
2 each other with the opposite rhetoric. You're trying to say
3 that they say that they're doing sales, and they're trying to
4 say that you say that they're not. But there is a reality that
5 is different in the way both of you are characterizing it. I
6 can't just say, well, they misspoke, so you win. I can't say
7 that to them, either. You've got to tell me in what way
8 that -- you say that this is an inappropriate set of
9 allegations. Because when I read this complaint, the
10 conclusion that I have to reach from the factual allegations in
11 the complaint is that, in this 90-day period, their job is to
12 be salespeople, but I'm not sure I hear you arguing that, that
13 their job in this 90-day period is to be salespeople.

14 If I say to you: Oh, look at that guy standing over
15 there. What's his job?

16 It doesn't sound like you are saying to me: Oh, that
17 guy is a salesman.

18 So I'm trying to think about the practical reality.

19 MR. MANDEL: I understand the disconnect, your Honor.
20 The reason there is a disconnect is because, on the motion to
21 dismiss, we're taking plaintiff's allegations. As you just
22 noted their allegation is that they are salespeople.

23 THE COURT: The allegation is that they are involved
24 in some sales. You are not saying that that in and of itself
25 makes them salespeople? Are you arguing that?

F7v4Bluc

1 MR. MANDEL: I'm arguing that their allegations in the
2 complaint is that their primary duty is sales; that they,
3 therefore, qualify for the outside salesperson exemption.

4 THE COURT: Show me that language that you're relying
5 upon that should be fatal to their claim.

6 Just tell me, where is the handiest complaint?

7 MR. MANDEL: It is attached as Exhibit A, which is
8 docket 28-1, which is Exhibit A to Mr. Goldstein's affirmation.

9 THE COURT: Got it. Okay. So show me their
10 characterization of these people as salespeople that is fatal
11 to their complaint.

12 MR. MANDEL: The paragraph 67, your Honor.

13 THE COURT: Okay.

14 MR. MANDEL: It says, during the development stage,
15 the development-stage trainees are expected to engage primarily
16 in lead-generation activities.

17 THE COURT: Right.

18 MR. MANDEL: Those lead-generation activities are part
19 and parcel of their sales activities.

20 THE COURT: Wait a minute. That's not what you just
21 argued. You said that they said in the complaint that they
22 were salespeople, primarily engaged in sales, and that's what's
23 fatal to their complaint.

24 MR. MANDEL: The paragraph right above it, your Honor,
25 puts it into context: The primary duties of all

F7v4Bluc

1 development-stage trainees include inside sales and customer
2 service.

3 THE COURT: Okay.

4 MR. MANDEL: So the dispute is, is this inside sales
5 or outside sales based on plaintiff's allegations.

6 THE COURT: So your argument is, because they phrased
7 it that their primary duties include inside sales, that's fatal
8 to their complaint, so that makes them exempt by definition?

9 MR. MANDEL: As a matter of law, yes.

10 THE COURT: I'm trying to understand the extent of the
11 argument. As they say, the most effective advocacy is to be
12 consistently reasonable. I am trying to figure out whether
13 your argument is reasonable or unreasonable. These are not
14 trick questions. I will flag it for you.

15 If you are saying to me that simply because -- if
16 their job description and their job responsibility does not
17 require sales, if you're arguing to me that simply because if
18 they happen to find somebody who wants to buy something, they
19 have the opportunity to sell them, but they're not required to
20 do that, and that's not the requirement of their job, then I
21 would say that that would be unreasonable for you to say simply
22 because of that in the abstract that that qualifies everybody
23 as an exempt salesperson.

24 What I start out with, always start out with is, what
25 is the job description and what are the job requirements.

F7v4Bluc

1 That's the first thing I ask. The job description, I don't see
2 where it includes sales. Does the job description or the job
3 requirement include sales for these employees during this
4 three-month period of time? Is the answer yes or no?

5 MR. MANDEL: Does it require sales and does it
6 require --

7 THE COURT: Does the job description say that part of
8 their job is to make sales, and is the requirement of their job
9 to make a sale? Is there someplace --

10 MR. MANDEL: Yes. It is the page that Mr. Swartz was
11 referring to you before, making a minimum of 25 contacts per
12 day, setting financial profiling appointments.

13 THE COURT: That's not an executed sale.

14 MR. MANDEL: It doesn't have to be.

15 THE COURT: That's the point. It doesn't have to be a
16 sale. You just said that. If the person is a salesperson,
17 then it has to be a sale. If the person is something else --

18 MR. MANDEL: But --

19 THE COURT: I don't see any language. I understand
20 your argument, that's your argument, that I should interpret
21 that language to mean that they have to accomplish a sale, but
22 I'm not sure that that's what you're urging upon me. I'm not
23 sure you're saying that that language means that they must
24 accomplish a sale.

25 MR. MANDEL: But whether they must accomplish a sale

F7v4Bluc

1 is beside the point. It is what they're actually doing --

2 THE COURT: Right.

3 MR. MANDEL: -- and they have pled, and their own
4 declarations, state that they are engaged in these sales
5 activities in terms of generating leads and attempting to get
6 clients to use their services.

7 THE COURT: Would you agree with the fact that if
8 their job description says they have to simply generate leads
9 short of making a sale, and the requirement for them to
10 maintain that job and move on to the next level is that they
11 generate these leads, but it's not required that they make a
12 sale; that simply because in the three-month period where
13 someone meets all these requirements and creates all of these
14 leads and potential clients and that sort of thing, you say
15 that the person who in that three-month period -- I'm going to
16 give you three people. I'm going to give you a person who, in
17 that three-month period, accomplishes 100 sales. Okay. Then,
18 I'm going to give you a person in that three-month period who
19 does one sale. And then I'm going to give you a person during
20 that three-month period who does absolutely no sales. Your
21 argument would be that every one of those individuals is exempt
22 because it is possible that they might do sales, and it would
23 be in their best interests to pursue sales because they're
24 probably going to get a commission on it. So the fact that
25 they have the opportunity to do sales, even though that's not

F7v4Bluc

1 their job responsibility, job requirement, or job description,
2 that that qualifies them automatically, makes no question about
3 it, that they must be salespeople; so, therefore, they can't
4 sue.

5 MR. MANDEL: Yes, but with the qualification that I
6 don't think that we're saying that's not part of their job
7 duties.

8 THE COURT: Where does it say it is part of their job
9 duties?

10 MR. MANDEL: The points I just explained.

11 THE COURT: No, you didn't explain. Where does it say
12 that part of their job duties is to make a sale?

13 MR. MANDEL: I think I can help by clarifying --

14 THE COURT: It doesn't say that.

15 MR. MANDEL: It doesn't specifically say they must
16 make a sale. One point of clarification --

17 THE COURT: Slow down.

18 I just want to put that aside. I don't want us to
19 talk past each other. You can argue what you say it means. I
20 can understand that. But I want to make sure I'm not missing
21 something, that there is something in this pile of papers that
22 I have where the words "salespeople" or "sales" is there and
23 I'm not looking at it.

24 Am I correct? I haven't found anything that
25 specifically references sales in their job responsibilities or

F7v4Bluc

1 duties because it is not here? Is that correct?

2 MR. MANDEL: In the first 90 days, that is correct.
3 There is no minimum requirement that they do any sales.

4 THE COURT: Okay.

5 MR. MANDEL: Thereafter, in subsequent periods of
6 their employment during this, there is.

7 THE COURT: Right.

8 MR. MANDEL: However -- this is one point I want to
9 make to correct something Mr. Swartz said -- during the first
10 90 days when they're generating leads and doing these things,
11 these development stage employees, they are able to consummate
12 those sales, and in fact they do consummate those sales.

13 THE COURT: Is there some guidance that is here --

14 MR. MANDEL: Yes, your Honor. If you look at the same
15 document that we were referring to earlier, Exhibit C attached
16 to Mr. Swartz's declaration --

17 THE COURT: Yes.

18 MR. MANDEL: -- and I apologize, I don't have the ECF
19 number, but it is page 13 of the actual internal document
20 number. At the top of the page, it says, monthly incentive
21 compensation.

22 THE COURT: Yes.

23 MR. MANDEL: The second paragraph says, every month,
24 beginning with the development stage, PMD FAs will be eligible
25 to receive incentives based on the compensation calculated on

F7v4Bluc

1 the PCs -- which are production credits -- generated that
2 exceeds the sum of monthly salary and the prior month's monthly
3 tiered performance award.

4 THE COURT: Okay.

5 MR. MANDEL: These individuals are eligible to and
6 they receive compensation from consummating their sales. The
7 point is, though, in the first 90 days, they have no minimum
8 requirement that if they don't make any sales, they're going to
9 be fired or they are going to be disciplined. They're just not
10 going to make as much money, and it is, obviously, going to be
11 to their detriment as they progress in their careers if they
12 haven't generated leads, if they haven't established clients or
13 made sales. It just makes it that much harder.

14 THE COURT: But the purpose of their job activity
15 during this three months, the purpose is not to generate sales.
16 That's not the purpose. That's not what they're supposed to be
17 doing. That's not the purpose of this three-month period, is
18 to see how many sales that they can generate.

19 MR. MANDEL: Well, the problem is, it is something of
20 a hybrid. This goes to the conditional certification motion,
21 because the primary duty, what people are actually doing, is
22 different. Somebody who comes into the program who has never
23 been, has no contact, maybe they were a hermit, and they go
24 through this program, they become a licensed financial advisor,
25 and then they enter the development stage. That person will

F7v4Bluc

1 have to spend their time trying to find leads, generate
2 contacts, and ultimately consummate sales.

3 THE COURT: Right.

4 MR. MANDEL: On the other hand, there are people who
5 join the program with vast networks of people. Like your Honor
6 said before, people I play basketball with on Tuesday night, I
7 play basketball with a bunch of rich lawyers who I want to turn
8 into clients. Maybe they all say, hey, Mike, we think you're a
9 great guy, we want to give you all our business as soon as you
10 become a licensed advisor. So day 1 of development stage, I
11 have 10 guys who are willing to give me their money to handle
12 for them and advise them on how to manage it. Then, my job for
13 that first 90 days is not making sales. Then my primary duty
14 is financial advice, finance consulting, and managing these
15 people's wealth.

16 THE COURT: Where is that laid out as part of their
17 job responsibility?

18 MR. MANDEL: We don't have all of the documents here
19 because we're on the motion to dismiss and their motion for
20 conditional certification. We don't have all the official
21 company policies and such. If you look at the declarations
22 that we have submitted, it shows a variance, that we have
23 submitted declarations from some financial advisors who in the
24 first 90 days already had established client bases, and they
25 have --

F7v4Bluc

1 THE COURT: Some.

2 MR. MANDEL: Some, of course.

3 THE COURT: How does that define everybody --

4 MR. MANDEL: It doesn't.

5 THE COURT: -- in that period of time as a
6 salesperson?

7 MR. MANDEL: It doesn't.

8 THE COURT: I thought part of your argument for
9 dismissal was that everybody in this -- I guess I really have
10 to point more directly to the plaintiffs because I'm going to
11 separate those issues. They're two different considerations.
12 If they want me to certify, they've got to show me the
13 commonalty with regard to the clients. If you want me to
14 dismiss, you have got to show me that Mr. Blum or Mr. Harrison
15 are salespeople.

16 MR. MANDEL: That's correct.

17 THE COURT: So what qualifies Mr. Blum as being a
18 salesperson?

19 MR. MANDEL: Okay.

20 THE COURT: He doesn't say he is a salesperson.

21 MR. MANDEL: To clarify, you're right, the motion to
22 dismiss is directed just at Mr. Blum and Mr. Harrison, not at
23 everybody who worked in this position.

24 THE COURT: Those are two different issues.

25 MR. MANDEL: Now we go back to the conversation we

F7v4Bluc

1 were having earlier. Mr. Blum and Mr. Harrison are salespeople
2 because that is what they have alleged in their complaint.

3 THE COURT: You're relying solely on paragraph 66?

4 MR. MANDEL: Not solely paragraph 66.

5 THE COURT: Well, give me some more, then.

6 MR. MANDEL: Again, paragraph 26, Mr. Blum talks about
7 attending client prospecting functions --

8 THE COURT: You say that is necessarily consummating a
9 sale or trying to make a sale?

10 MR. MANDEL: Yes. It is not consummating a sale, but
11 it is certainly in furtherance, it is directly related to the
12 duty --

13 THE COURT: What paragraph?

14 MR. MANDEL: I'm looking at paragraphs 26 through 29
15 for Mr. Blum.

16 THE COURT: I want you to point me to specific
17 relevant language.

18 MR. MANDEL: Okay.

19 THE COURT: What is the language that you say is
20 language in which Mr. Blum is saying I am a salesperson?

21 MR. MANDEL: Paragraph 26, throughout his employment
22 with defendants, in addition to his regular schedule, Blum
23 attended client prospecting functions.

24 THE COURT: Well, wait a minute. You're not saying
25 client prospecting functions is a sale.

F7v4Bluc

1 MR. MANDEL: It is not a sale, but it is certainly
2 designed to lead towards a sale.

3 THE COURT: But not necessarily by him.

4 MR. MANDEL: No, by him.

5 THE COURT: Client prospecting functions.

6 MR. MANDEL: That is, for him, to go try to meet
7 prospective clients to turn into his clients. That's how he is
8 going to make money.

9 THE COURT: Not during the 90-day period.

10 MR. MANDEL: Yes, during the 90-day period.

11 THE COURT: You're saying that attending client
12 prospecting functions is not in furtherance of the job
13 responsibilities that are laid out in the practice management
14 development program, incentive plan, but it is in furtherance
15 of a sale?

16 MR. MANDEL: Yes.

17 THE COURT: Let's put it this way: It says, one of my
18 job responsibilities was to identify and add 2,000 qualified
19 affluent leads to the salesforce.com. Okay?

20 MR. MANDEL: Correct.

21 THE COURT: That's not a sale; right?

22 MR. MANDEL: It is not yet a sale.

23 THE COURT: It is not a sale by Mr. Blum?

24 MR. MANDEL: Not yet.

25 THE COURT: Mr. Blum says, I attended a client

F7v4Bluc

1 prospecting function in order to identify and add a qualified
2 affluent lead. That has nothing to do with the sale. That has
3 to do with adding a client affluent lead.

4 MR. MANDEL: But the point of his adding a client
5 affluent lead is so that he can follow up with that lead and
6 make them a client to make a sale.

7 THE COURT: Not necessarily. The point of doing
8 that -- and not primarily -- the point of doing that is so that
9 someone might be able to make this person a client. It doesn't
10 say that this has to be your individual client.

11 MR. MANDEL: With due respect your Honor, that's not
12 how it works. These people are there because they make
13 commissions on sales that they consummate. No one in this
14 company, quite frankly, is looking to generate a client for
15 another financial advisor.

16 THE COURT: He's attending a client prospecting
17 function in order to make a sale during this 90-day period?

18 MR. MANDEL: That is true. It does not say that. But
19 he can do that.

20 THE COURT: Right. He can.

21 MR. MANDEL: That, I'm sure, his goal in doing that.
22 That's the only plausible reason he would be doing this.

23 THE COURT: No.

24 MR. MANDEL: He wants to make a sale so he can make
25 commissions and make more money.

F7v4Bluc

1 THE COURT: I can't accept that. The plausible reason
2 is so that when they are fully qualified to make sales on their
3 own and they have a book of business that they have a bunch of
4 prospective clients that they can pursue in maaing that book of
5 business. It doesn't necessarily mean that, nor do I think it
6 is logical, that they're in training, and what you're trying to
7 get them to do during this 90-day period is to cozy up to a
8 potential client on day 6 and make a sale on day 7. That is
9 not the intent of the 90-day period, is it?

10 MR. MANDEL: Absolutely, it is.

11 THE COURT: Where does it say that?

12 MR. MANDEL: From day 1, they are fully qualified.
13 These are licensed representatives.

14 THE COURT: You said they're not even expected to make
15 one sale.

16 MR. MANDEL: That is to give them a ramping-up period.
17 They're not given any minimum standards.

18 THE COURT: That's not a ramping-up period. You said
19 to me -- and I accept that -- that they are not required to
20 make a single sale during this 90-day period.

21 MR. MANDEL: That is correct.

22 THE COURT: You say, even though none of these
23 employees are required to make a single sale during the 90-day
24 period, they qualify as salespeople because they could make a
25 sale if they wanted to. That's basically your argument?

F7v4Bluc

1 MR. MANDEL: Yes, because they are trying to make a
2 sale.

3 Go back to the analogy of the vacuum clean salesman --

4 THE COURT: How do I know they're trying to make a
5 sale?

6 MR. MANDEL: Because that's how they're going to make
7 money.

8 THE COURT: No, that's the problem I have. That's not
9 how they're making money in this 90-day period. They're
10 getting paid a salary.

11 MR. MANDEL: And they're eligible for commissions for
12 every sale that they make.

13 THE COURT: Yeah, but I don't know what percentage of
14 people even made a single sale. How do I decide that on the
15 face of the complaint? You're saying that even if the facts
16 turn out to be that 90 percent of the people during this period
17 of time didn't make a single sale, that I should dismiss this
18 complaint because it is possible they could make a sale, that
19 qualifies them as salespeople that are exempt?

20 MR. MANDEL: Yes, because Mr. Blum and Mr. Harrison
21 have alleged that their duty was inside sales, but the facts as
22 they otherwise allege are that they were making those sales
23 outside. The fact that they don't actually make a sale, that
24 doesn't remove them from the realm of the exemption.

25 THE COURT: If that is their job responsibilities,

F7v4Bluc

1 requirements, during that 90-day period, I can understand that
2 but --

3 MR. MANDEL: But they have alleged that it is, your
4 Honor.

5 THE COURT: Well, that's what I'm saying. I have to
6 understand your argument. Because they have alleged that one
7 of the things that they do or might do during this 90-day
8 period is make a sale, you say that that would itself
9 disqualify them because it makes them an in-house salesperson?

10 MR. MANDEL: They have not just alleged it is one of
11 the things they do; they have alleged it is one of their
12 primary duties. They have alleged it is inside sales. But the
13 other facts that they have alleged --

14 THE COURT: When you say that the fact they allege
15 that that is their primary duty, are you only relying on
16 paragraph 66?

17 MR. MANDEL: Yes. I'm relying on paragraph 66, where
18 they specifically allege the primary duties include inside
19 sales. I'm not sure that I need to rely on more than that.

20 THE COURT: It would be helpful if you could rely on
21 more than that.

22 MR. MANDEL: Also, the statement in plaintiff's reply
23 brief that I pointed to. They have acknowledged it. They
24 can't run away from that now.

25 THE COURT: All right. You say that simply because

F7v4Bluc

1 they say that one of the things that their primary duties
2 include is an inside sale and customer service, that that in
3 and of itself is a factual allegation that makes it impossible
4 for them to be classified as anything other than an inside
5 salesperson?

6 MR. MANDEL: Yes, except they're not an inside
7 salesperson. They qualify for the outside salesperson
8 exemption because the other factual allegations indicate that
9 they are customarily and regularly outside of the office,
10 engaged in these sales activities.

11 THE COURT: Other than in this courtroom, is there
12 anybody at the company, if I walked into the company and asked,
13 what do these people do, who would say to me, oh, they're our
14 salespeople? Is there anybody who realistically would say
15 that? No one would say that.

16 MR. MANDEL: It is possible. I couldn't say.

17 THE COURT: It is not likely they would say that.
18 They're in a three-month training program in which none of the
19 job responsibilities or requirements are they generate sales.

20 If I said, would you direct me to a salesperson,
21 please, they're not going to send me to one of these guys.

22 MR. MANDEL: Absolutely, they would, your Honor.
23 These are licensed financial advisors who already, at this
24 development stage, they have already been through two or three
25 years of training. This isn't like they're straight out of

F7v4Bluc

1 college.

2 THE COURT: And they are identified somewhere in this
3 company as the salespeople?

4 MR. MANDEL: I can't say that they're identified
5 somewhere as the salespeople. The job title is not relevant.
6 It is what they're doing.

7 THE COURT: Right.

8 MR. MANDEL: What they're doing is --

9 THE COURT: How do I determine, in fact, that what
10 Blum and Harrison are doing in their day-to-day activity is
11 that they're spending more than 21 hours of their activity
12 generating and pursuing actual sales? How do I determine that?

13 MR. MANDEL: Well, first of all, I'm not sure why you
14 used 21 hours as a benchmark. I don't think there is
15 necessarily any authority for that.

16 THE COURT: I'm going by what you say that this
17 representation is supposed to mean. What do you think? You
18 think that it is good enough to be what, a quarter of the
19 time --

20 MR. MANDEL: Not necessarily --

21 THE COURT: -- 10 percent of the time? How am I
22 supposed to evaluate that?

23 MR. MANDEL: The cases and the regulations and opinion
24 letters that we have cited say, if you're out of the office a
25 couple of days a week a couple of hours each, that is

F7v4Bluc

1 sufficient. That is clearly what Mr. Blum and Mr. Harrison
2 have alleged.

3 THE COURT: Out of the office --

4 MR. MANDEL: Out of the office engaged in these types
5 of activities. For example --

6 THE COURT: Wait a minute. That's not what you're
7 relying on. You're relying on their statement that their
8 duties included inside sales.

9 MR. MANDEL: Right.

10 THE COURT: That's not outside sales.

11 MR. MANDEL: But in paragraph 26, Mr. Blum attended
12 client prospecting functions in the evening --

13 THE COURT: It doesn't say he was pursuing a sale.
14 Wouldn't you agree that that paragraph could apply to every
15 single requirement that he has to meet during this three-month
16 period? He could be doing that in order to establish one of
17 his 25 contacts. He could be doing that to spend his minimum
18 seven hours in contact with potential clients. He could be
19 doing that in furtherance of his attempt to host eight
20 financial profiling appointments. He could be doing that to
21 identify and add one of his 2,000 qualified affluent leads. He
22 could be doing that to identify 100 prospects for immediate
23 pipeline. All of those things independently are not sales.

24 So I'm supposed to read from that that that means he's
25 engaged in sales?

F7v4Bluc

1 MR. MANDEL: Yes. I do think so because the
2 regulations state that the activity that is focused on
3 generating one's own sales activities are included as part of
4 outside sales activities.

5 THE COURT: Where does it say in paragraph 26,
6 generating sales activity?

7 MR. MANDEL: He called it client prospecting
8 functions.

9 THE COURT: Okay. Isn't every one of these bullet
10 points related to that?

11 MR. MANDEL: Yes.

12 THE COURT: And those aren't sales points?

13 MR. MANDEL: Those are all geared towards him
14 generating his own sales.

15 THE COURT: No, they're geared toward identifying
16 prospective clients for Merrill Lynch.

17 MR. MANDEL: They're trying to identify clients for
18 that individual financial advisor, not for Merrill Lynch.

19 THE COURT: Where does it say that? Clearly, it
20 doesn't say for them to necessarily do that during that 90-day
21 period.

22 MR. MANDEL: I'm not sure -- not necessarily do what
23 during that 90-day period?

24 THE COURT: Make a sale.

25 MR. MANDEL: Correct. There is no minimum sales

F7v4Bluc

1 requirement.

2 THE COURT: That isn't even the goal. The primary
3 goal is not for them to make the sale in the 90-day period.
4 This is a training program. Sure, if they happened to be the
5 hot salesperson who is advancing as a trainee and can make
6 sales and doesn't even need a training program, of course
7 you're going to let them do that, and they're going to generate
8 it. But that is not the goal of the 90-day period.

9 MR. MANDEL: Think of an analogy, your Honor, where
10 you're teaching a kid to ride a bike, and they have 90 days to
11 do it. So you put training wheels on them. They're going to
12 ride the bike. Some kids are going to be able to do it without
13 the training wheels during the 90 days. That is a goal.

14 THE COURT: That is not their job.

15 MR. MANDEL: They want them to ride the bike. Their
16 job is to learn to ride the bike.

17 THE COURT: Their job is not to accomplish riding the
18 bike without training wheels during that 90-day period.

19 MR. MANDEL: That's the goal.

20 THE COURT: It's not the goal. That's the point.
21 It's not the goal. Even on your example, the goal is not to
22 learn to ride a bike in 89 days. The goal here is not to learn
23 to be able to generate sales within that 90-day period. The
24 goal is that when you learn those skills and you meet these
25 requirements, then you move on to the next phase. Then you'll

F7v4Bluc

1 be in a position, so that by the time you're going to make your
2 full-fledged salesperson that you got a book of business and
3 you can hit the ground running. That is pretty much it. It
4 isn't that complicated, is it? Is it an inaccurate way to
5 state that?

6 MR. MANDEL: I think that is fairly accurate. That
7 dovetails into the conditional certification motion. If you
8 look at the range of people in this 90 days, people are doing
9 the job very differently. Some of them have already learned
10 how to ride the bike, they came into the program knowing how to
11 ride the bike.

12 THE COURT: Why is that determinative. Whether they
13 do it differently is not determinative. What they're supposed
14 to do, what they were required to do and what they have been
15 paid for is determinative.

16 MR. MANDEL: No, I respectfully disagree, your Honor.
17 What really matters is the job duties that the individuals are
18 actually performing.

19 THE COURT: How would it make a difference in terms of
20 whether or not they are properly paid or not properly paid?

21 I say to you that I want you to flip burgers at
22 McDonald's for me and I say I'm going to pay you \$1 an hour to
23 flip burgers. Somebody says, you know what, that's not minimum
24 wage. And they want to sue. Another guy says, you know what,
25 I flip burgers, too. But one guy says, well, you know, I flip

F7v4Bluc

1 burgers with my right hand and you flip burgers with your left
2 hand, and I cook them for 20 minutes but you only cook them for
3 15 minutes. What difference does that make? What is the
4 substantive difference that would exclude someone from the
5 general allegation that, look, I am one of their trainees, this
6 is what we're all told we're supposed to do, this is what we're
7 all being paid for. We should all be paid for doing the job
8 that they say we're required to do. And there is no difference
9 from what those requirements are.

10 And let me just add one other thing. What puts you in
11 a little awkward position is because you're making the exact
12 opposite argument that Merrill Lynch was making in California
13 when you wanted the court to certify a much broader class so
14 that you could settle the case, and you urged upon the court
15 that this was a totally appropriate class to certify. So it is
16 a little awkward for you to say now, this is ridiculous, how
17 could anybody think to certify this class, when the much
18 broader class, Merrill Lynch took the position in California,
19 that it was appropriate for class certification, and I'm not
20 even there yet. So, sure it was appropriate for class
21 certification if they say, well, you can get out of the case
22 but it is not now appropriate for conditional certification
23 when the case wants to move forward. That is a little awkward
24 situation for you to be in as their attorney.

25 MR. MANDEL: Maybe it is a little awkward as I'm

F7v4Bluc

1 standing here now listening to you say it, but I don't think
2 so.

3 THE COURT: Is there a reason why Merrill Lynch
4 thought it was appropriate for a class in California, even a
5 broader class that included these employees and other
6 employees, so they could settle the case, but now they have got
7 an about-face on an even more limited class? As a matter of
8 fact, a class that they fault against, you included. You said
9 it was appropriate to dump all these people in the same boat.

10 MR. MANDEL: Well, I think your Honor would recognize
11 the practical reality of trying to settle a case versus
12 litigating a case.

13 THE COURT: I do.

14 MR. MANDEL: Obviously, when we are settling the case,
15 everyone is trying to work together towards an appropriate --

16 THE COURT: I understand that. I understand greater
17 the practical reality of what the judge is faced with. The
18 judge is faced with, not a practical reality that just because
19 you think this is in your financial best interest that the law
20 should be bent to accommodate that.

21 MR. MANDEL: Right.

22 THE COURT: The Court looked at it and said, wait a
23 minute, this doesn't make sense. The Court disagreed with you
24 and said it didn't make sense. I think it is just that to now
25 be in a position to say, well, you know, we just changed our

F7v4Bluc

1 mind because now it is not to our advantage is a little awkward
2 in terms of my making an independent assessment of whether or
3 not at least conditionally this is a proper class.

4 What is it that you say is different between Mr. Blum
5 and your hypothetical non-common employee that would make a
6 difference in terms of a class-wide determination of whether or
7 not they are being properly paid?

8 Because I don't hear you say that. I hear you say, in
9 one instance, well, everybody does it a little different.
10 Then, I hear you on the other side saying, well, you know,
11 they're all just a bunch of salespeople.

12 MR. MANDEL: First of all, one of the differences is
13 the plaintiffs, for Mr. Blum and Mr. Harrison, they essentially
14 claim they were inside salespeople. They sat inside and cold
15 called people and tried to generate these leads. They never
16 made any sales, and that was their job.

17 THE COURT: Okay.

18 MR. MANDEL: On the other hand, we have presented
19 declarations and evidence from people who described that that
20 was not how they performed the job. As Mr. Swartz acknowledged
21 earlier, Merrill Lynch gives people wide latitude to perform
22 the job as they see fit. Financial advisors are essentially
23 entrepreneurial. They are given these incentive compensation
24 guidelines and then told, go ahead and try to bring in
25 business, and that's how you're going to make money.

F7v4Bluc

1 THE COURT: Wide latitude to do the job as they see
2 fit is not the determinative factor --

3 MR. MANDEL: No --

4 THE COURT: -- as to whether or not they have a claim,
5 whether or not they have a common claim.

6 MR. MANDEL: I understand. Well, it is whether they
7 have a common claim because --

8 THE COURT: Why would one win and the other lose?
9 That is what I'm trying to understand.

10 MR. MANDEL: Sure. Because if Mr. Blum and Harrison
11 are correct and the evidence is that they just sat in the
12 office cold calling people all day and that was all that they
13 did, and then you contrast that with some of the declarations
14 of people that we submitted that indicate that there were
15 people that spent all of their time or a vast majority of their
16 time outside of the office meeting with clients and developing
17 business and consummating sales, there could be no question
18 that those latter people are exempt under the outside
19 salesperson exemption, while Mr. Blum and Mr. Harrison, if
20 their allegations are to be believed, would not qualify for the
21 outside salesperson exemption because they're so-called inside
22 salespeople. That's a critical distinction between the people.

23 THE COURT: The problem that you give me is that all
24 you give me is a factual dispute. You don't say that this is
25 what was required of them. You don't say, this is what they

F7v4Bluc

1 were being paid to do. You don't say, this is what they were
2 required to do or this is how we defined their job. You're
3 just saying that we said you got to do A, B, C, and D, and we
4 gave them a little latitude about how they do it. I mean,
5 whether or not that is going to put some people in the class
6 and not put some people in the class, quite frankly, I'm not
7 sure legally that would do that, simply because you say to me
8 that I put it in a basic employment situation. Just because
9 you say to me that, okay, well, you make deliveries for our
10 restaurant, you can use your car, and if you want, you can use
11 your bicycle. What difference does it make? It is not part of
12 the job requirements, responsibilities, duties. There is
13 nothing that you even imply that is in the job description that
14 would set limits, goals, direction as to how they're supposed
15 to individually do that.

16 So the real question is: Well, what are you hiring
17 them to do? See, the thing you say that, okay, I've got these
18 other affidavits, and these people are out there running around
19 outside doing sales calls. Then, I ask you: Well, is that
20 their job? You say: Well, not really. They don't have to do
21 that. That's not what we're paying them for because they could
22 sit in the office and do the cold calls. They cannot generate
23 any sales. That's not what we are paying them for. That's not
24 the job classification that they're in. The job classification
25 that they're in is that they have to generate leads. End of

F7v4Bluc

1 story. We don't require them to do anything. If they generate
2 leads, they have earned their pay. That is what you say to me.
3 You said: Well some, generate leads and make sales. Some
4 generate their leads in the office. Some generate their leads
5 out of the office.

6 Well, I mean, yeah, that may make a difference if it
7 can be demonstrated that as the class is defined and as the
8 commonality shows that of the 10,000 -- and I'm sure it is more
9 than that or maybe not more -- of the 10,000 workers, 9,000
10 fall into the class. Well, that doesn't mean I don't certify
11 the class because you have a few people or a thousand people
12 who you say, well, they work from home. Okay, they might not
13 be in the class if we have to define the class more
14 specifically. But I'm still not sure how the class is being
15 defined that excludes these people who say, yeah, I work both
16 in the office and outside of the office, so I'm a salesperson.
17 So if Mr. Blum recovers, I know I'm not going to recover
18 because I work outside the office.

19 Well, they might say to themselves, wait a minute, you
20 know what, just because I worked outside the office, I worked
21 outside the office but I didn't know I was supposed to be paid
22 more. They didn't tell me to work outside the office. They
23 said, do what you got to do. They say, you have to meet these
24 job responsibilities. I met these job responsibilities, and
25 they required that I generate these kinds of leads. I

F7v4Bluc

1 generated the same kinds of leads.

2 I don't remember all of the details of the employees
3 that you gave, but I mean the example that a person may have
4 done leads outside the company still doesn't tell me whether or
5 not that is going to exclude them from a class of employees
6 whose job it is to generate leads and not necessarily make
7 sales. And it doesn't tell me how much sales they're making,
8 how much time they're pursuing sales. I mean, those are
9 factual issues. As I say, I assume that it didn't exclude them
10 from being in the settling class because there was some
11 incentive to settle the case. It still doesn't change the
12 legal analysis for either me or the judge in California as to
13 whether or not they are properly in a class and whether or not,
14 at least to the limited extent consistent with the judge in
15 California's position, that maybe this more limited class. I
16 mean, I can understand the idea that, look, you can't lump the
17 actual later salespeople in the same class as the trainees. I
18 think that was more the issue for California than the issue
19 that we're dealing with. I just don't understand what the
20 argument would be that I can make a determination that the
21 plaintiffs' allegation clearly make that salespeople and that
22 their allegations can't qualify as to numerosity, commonalty,
23 and all the other factors that will have to be examined later
24 and not now because I have a few people who say, well, that's
25 not the way I did it, even though we all had the same job

F7v4Bluc

1 requirements, same job description, and the same job
2 expectations by the employer. Those are the issues that I
3 have.

4 Go ahead. I'm sorry.

5 MR. MANDEL: Thank you, your Honor.

6 I think it is important to keep in mind that the
7 ultimate issue in the case, whether people were properly exempt
8 or not exempt, is a focus on the actual job duties that they
9 performed. While the distinction between inside and outside
10 may seem somewhat artificial, that is a distinction that the
11 legislature and the Department of Labor has drawn. While it
12 may seem silly to us that, well, someone sitting on a phone
13 making calls is non-exempt but someone who goes outside and
14 goes and meets with clients is exempt for doing the same thing.
15 That's what the law is.

16 THE COURT: No, the law is not that. The law focuses
17 primarily on what the requirements of the job are and what the
18 expectations are of the employer as to what the client is being
19 paid for and how it is described. And you can't just simply
20 say that no, it is not part of the job description, it is not
21 there, it is not what they say they're paying you for, but they
22 allowed me to do it that way, and that's supposed to be
23 primarily determinative over how you describe the job.

24 Let's go back to my simple McDonald's example. Okay?

25 MR. MANDEL: Can we do flipping pizzas? I like pizza

F7v4Bluc

1 better.

2 THE COURT: McDonald's is easier because they have
3 different products than just pizza.

4 If I said to you, look, you advertised this job as a
5 cook. All right? And I said, okay, yes, we need somebody to
6 cook hamburgers. Do you have experience cooking hamburgers?
7 Yes. We also have some other jobs cooking French fries and
8 cooking fish, but we're looking for a guy who can cook some
9 hamburgers. So I hire you. And I say, your responsibility is
10 to cook hamburgers, but here's your job description. It says
11 you got to work in the kitchen, and this is how much you're
12 going to get paid X, Y, and Z. Then I hire another guy. The
13 other guy, I say, okay, we're looking for somebody to cook
14 French fries. But this is really the job description. You're
15 a cook. When you get here, that's the way we're going to
16 assign you. This is the way we want you to do it.

17 Your theory would be that even though I hired both of
18 these people as a cook, even though I paid them exactly the
19 same salary, even though the job requirement doesn't say
20 anything about whether you cook French fries or hamburgers,
21 that once they get there, if one is cooking French fries and
22 the other one is cooking hamburgers, they can't be in the same
23 class --

24 MR. MANDEL: Well --

25 THE COURT: -- because they do it differently.

F7v4Bluc

1 How is that determinative?

2 MR. MANDEL: Let me take the analogy and expand it
3 further. You hire somebody to work at McDonald's, and you say
4 their job is to sell French fries. You have one of those
5 employees comes in, and he stands at the counter, and he sells
6 French fries at McDonald's, and then the other employee takes
7 those French fries and he goes door to door and knocks on doors
8 and says, hey, would you like to buy some French fries. That
9 second person, he is exempt from overtime. He is an outside
10 salesperson.

11 THE COURT: No.

12 MR. MANDEL: It does not depend, your Honor, I
13 respectfully disagree --

14 THE COURT: No, it depends on whether that is his job,
15 to go out and go to places and sell French fries. You can't
16 let the employee define the job. The employee doesn't define
17 the job; the employer defines the job.

18 And also, let me concede you the point, you may be
19 right, it may ultimately turn out to be that despite the lack
20 of specificity that directs the employee to these
21 responsibilities, if you ultimately show that 90 percent of
22 these people are running around the street making sales, you
23 might have such an argument, but you don't have such an
24 argument now based on their complaint. How am I supposed to
25 determine that? I'm supposed to say, because you have a couple

F7v4Bluc

1 of people who say that they were outside salespeople? You're
2 not even alleging that that is what most people are doing. You
3 don't say, Judge, they can't meet the standard here because
4 Mr. Blum goes out and he does his calls from outside, he
5 doesn't do cold calling in the office. And they can't meet
6 commonality because we're going to demonstrate that of the
7 10,000 people that we employed to do this, 9,000 of them are
8 running around in the streets doing sales. Even if you were to
9 say that, I would say to you, well, okay, that's a factual
10 dispute. That doesn't seem to be where you are.

11 You're saying that I should say that Blum and Harrison
12 don't have a cause of action because they made a general, vague
13 statement that their job responsibilities included inside cold
14 calling. I'm not even sure if you're saying that the inside
15 cold calling would preclude their lawsuit. Are you saying
16 that?

17 MR. MANDEL: No. If they were doing inside cold
18 calling, that would not preclude their lawsuit. Our point,
19 though, is --

20 THE COURT: That is what paragraph 66 says that you're
21 relying upon.

22 MR. MANDEL: Correct.

23 THE COURT: That doesn't save you. That doesn't toss
24 out their complaint because they have given me a statement that
25 automatically would say that they could not have a cause of

F7v4Bluc

1 action.

2 MR. MANDEL: But they have other allegations that
3 acknowledge that they were doing sales activities outside of
4 the office.

5 THE COURT: I will give you one final shot at showing
6 me where those allegations are about sales activity in the
7 complaint that are outside of the office.

8 MR. MANDEL: The same as I said before. I have
9 nothing new to add on that.

10 THE COURT: You said there's other places.

11 MR. MANDEL: Other than that paragraph 66.

12 THE COURT: Other than 66, which you already concede
13 talks about inside --

14 MR. MANDEL: Correct.

15 THE COURT: -- sales activity, which you say wouldn't
16 disqualify.

17 MR. MANDEL: The fact that they call it inside sales,
18 that's a legal conclusion. They acknowledge they do sales.
19 There is no dispute that they do sales.

20 THE COURT: You don't say inside sales would dismiss
21 this complaint.

22 MR. MANDEL: Inside sales would not; outside sales
23 would.

24 THE COURT: It doesn't say outside sales.

25 MR. MANDEL: Yes, but in paragraphs 26 and --

F7v4Bluc

1 THE COURT: 26.

2 MR. MANDEL: -- 29, where it talks about attending
3 client prospecting functions, those are the outside sales
4 activities that we argue --

5 THE COURT: That may be outside sales activity, but it
6 doesn't say outside sales activity. You claim it is outside
7 sales activity. It doesn't say it is outside sales activity,
8 and it is just as consistent with non-sales activity; isn't it?

9 MR. MANDEL: I don't believe so, no.

10 THE COURT: Do you think every one of these bullet
11 points qualify as sales activity legally?

12 MR. MANDEL: If they are doing these activities
13 geared towards --

14 THE COURT: I didn't ask you that. Because it doesn't
15 say they did this activity geared toward making the sale. It
16 says, these are my job responsibilities. That is a good "if."
17 If you demonstrate that, you may win, but that is not what they
18 say. They don't say, I'm required to do these things so I can
19 make sales. It says, I'm required to do these things. And the
20 things in 26 and 29 are ways that you can do these things, and
21 they're ways that you could do sales, but it's ways you can do
22 non-sales. Right?

23 MR. MANDEL: Yes.

24 THE COURT: I mean --

25 MR. MANDEL: But when you read it in context with

F7v4Bluc

1 page 13 of that same document, where it says they're going to
2 receive incentive compensation for transactions that they have
3 originated --

4 THE COURT: Right.

5 MR. MANDEL: -- clearly the reason that they're doing
6 these 25 contacts per day, etc., etc., is to ultimately earn
7 these commissions.

8 THE COURT: No. It just means that in doing these
9 things, obviously the ultimate goal or what they're being
10 trained to do, the hope is in the future they will have a book
11 of business and do it. If they happen to stumble upon a sale,
12 they're going to get a commission. That's basically what it
13 says. It doesn't say that they're required to, expected to.
14 It doesn't say they're hoped to. It says, if they do happen to
15 get a sale right away, then logic dictates that they should get
16 a commission for it. That's not their job. Their job is not
17 to generate commissions. Is it? They're not being paid to
18 generate sales. That may be part of the activity. Okay. All
19 right.

20 Is there anything else that you need me to look at? I
21 want to find the language.

22 MR. MANDEL: No, I think --

23 THE COURT: I think I understand the argument, but the
24 language isn't as stark as you say --

25 MR. MANDEL: Sure. Let me go back for a second to

F7v4Bluc

1 what we were talking about. You were talking about the
2 expectations of the job and if somebody just happens to do
3 something. I think the case law and the regulations are very
4 clear that the focus is on the actual duties performed, not
5 necessarily on the employer's expectations.

6 THE COURT: You used the wrong term. You said
7 "duties."

8 MR. MANDEL: Correct.

9 THE COURT: A duty is something that you're required
10 to do.

11 MR. MANDEL: Right.

12 THE COURT: The actual things that you're required to
13 do. You've given me things they're not required to do.

14 MR. MANDEL: I'm talking about what they actually do.
15 The things that they actually perform. How they perform their
16 job --

17 THE COURT: I think you said it right the first time.
18 It's got to be their duties, got to be a duty of the job.

19 MR. MANDEL: Even if they happened to accidentally
20 perform the job in a way that was exempt, that would make them
21 exempt.

22 THE COURT: I can listen to that argument based on a
23 factual scenario before me if you want to make that argument.
24 I'm not quite sure whether or not I would buy that argument,
25 but I would make that argument, but that is a factual

F7v4Bluc

1 determination. That is not a pleading problem.

2 MR. MANDEL: Sure, but for purposes of the conditional
3 certification motion, plaintiffs have presented evidence that
4 some people perform the job in one way. We have presented
5 evidence that other people perform the job in a different way.

6 THE COURT: And they have alleged --

7 MR. MANDEL: The way the other people perform the job,
8 whether consistent with the job description or just accidentally,
9 they're performing the job in a way that would make them
10 exempt.

11 THE COURT: Okay. They have alleged that this is the
12 way that most or all of those people perform this job. When I
13 look at the job description, there is nothing inconsistent
14 about that. They say, look, we do cold calls in the office,
15 and that's it, and we're not salespeople, we're just supposed
16 to generate these leads. Well, when I look at, as you say, the
17 duties of the job, it doesn't say that they have to be
18 salespeople. And you respond that I have a few people who say
19 that that is not the way they did their job. Well, that's fine
20 and dandy, but what they do does not change what the job duties
21 are as you have laid them out, and the job duties as you have
22 laid them out is just as consistent, if not more consistent,
23 with what the plaintiffs say that in their experience that
24 everybody is pretty much doing the same thing, and they
25 demonstrated that everybody pretty much is being given a manual

F7v4Bluc

1 that tells them what to do. It is not a manual A and a manual
2 B; it is just manual A. Everybody is supposed to comply with
3 manual A. How they comply with manual A and what variations
4 there are may or may not be significant if you can demonstrate
5 that even though the job description isn't being a salesperson
6 but you can demonstrate that most of these people, if not all
7 of these people, but at least the named potential
8 representative plaintiffs are salespeople. Well, if that can
9 be demonstrated, they lose, and they get decertified.

10 At this stage, I don't know how I'm supposed to
11 resolve that just reading into the language that you pointed to
12 me to, to conclude that they must be talking about outside
13 sales activities, so they don't have a claim, and that most
14 people who they are similarly situated with. I'm not quite
15 sure whether your argument is that they're all in the same boat
16 because they're outside salespeople or they're all in different
17 boats.

18 MR. MANDEL: They're all in different boats. They're
19 all in different boats. That's our argument. While Mr. Blum
20 and Mr. Harrison may be sitting in an office cold calling and
21 that's all they are doing, as I said, we have presented
22 evidence that there are other people that are outside.

23 THE COURT: Okay.

24 MR. MANDEL: Further, we haven't even talked about the
25 administrative exemption. Mr. Swartz was saying the

F7v4Bluc

1 full-fledged financial advisors. We're not challenging them.
2 We're not saying full-fledged financial advisors are exempt
3 under the administrative exemption.

4 THE COURT: You really claim that these people are
5 financial advisors in this 90-day period?

6 MR. MANDEL: Yes. They are licensed by FINRA. They
7 have the same rights that any other full-fledged --

8 THE COURT: That doesn't define their job. You may be
9 a rocket scientist, but that doesn't define your job. You're
10 here acting as a lawyer. I don't know what other skills you
11 have.

12 MR. MANDEL: Very little.

13 THE COURT: So you're saying to me that because
14 they're licensed, even though their job responsibilities and
15 duties and requirements are not to make sales -- you don't
16 claim that this job that they're in is a job in which they're
17 hired and paid to give financial advice?

18 MR. MANDEL: It is.

19 THE COURT: Give me an example of the financial advice
20 that this job is paying them to give.

21 MR. MANDEL: A retiree who has significant assets to
22 invest, a financial advisor would tell them where and how to
23 invest those assets to best provide --

24 THE COURT: Where in the job description or the
25 description of what they're trying to accomplish during this

F7v4Bluc

1 90-day period that is laid out, that they're supposed to give
2 financial advice during this period?

3 MR. MANDEL: If you look at Exhibit D to Mr. Swartz's
4 declaration, this is essentially a marketing brochure that
5 describes what the financial advisors do --

6 THE COURT: Right. You think that when it says,
7 become a Merrill Lynch financial advisor, that the people that
8 they are describing are the trainees during this 90-day period?

9 MR. MANDEL: Yes. If you look at page 7 -- again, I
10 don't have the ECF number. It is page 7 of the actual
11 document. It describes the five distinct stages. At the top
12 of the page, it says, is the PMD program right for you? And
13 then it describes some of the things that go on during the
14 development stage.

15 THE COURT: Wait a minute. I'm sorry. Page 5?

16 MR. MANDEL: Page 7. It says: Is the PMD program
17 right for you?

18 THE COURT: Page 7, okay. Is the PMD program right
19 for you? Go ahead.

20 MR. MANDEL: If you look at the bullet points under
21 development stage, it says Merrill Lynch production number
22 assigned. That means that they are then eligible to get
23 commissions for anything that they generate.

24 Then, it talks about products and solutions training,
25 client acquisition skills training --

F7v4Bluc

1 THE COURT: We're talking here about the development
2 stage, right, the next three lines?

3 MR. MANDEL: Correct.

4 THE COURT: Where does it say here that during those
5 three months they're going to be paid to be financial advisors?

6 MR. MANDEL: Well, it doesn't say that specifically.
7 It is encompassed in all the documents.

8 THE COURT: It can't be encompassed in all the
9 documents. You have to show me where it says this. Where does
10 it say this? It is encompassed where? In what language?
11 Where does it say that their job responsibilities -- I'm not
12 even sure that is a logical thing to say. You're saying to me
13 that their primary job responsibility during this 90-day period
14 is to give financial advice to Merrill Lynch clients?

15 MR. MANDEL: For those financial advisors who already
16 have clients, that is their primary job responsibility.

17 THE COURT: No, no, no, no. You can't say it that
18 way.

19 MR. MANDEL: That's the truth.

20 THE COURT: No, I'm saying, people like Mr. Blum and
21 Mr. Harrison say that most people in the same situation I'm in,
22 we are in the 90-day training program. Under what argument,
23 based on these papers, am I supposed to conclude that Mr. Blum
24 and Mr. Harrison don't have a cause of action because they are
25 paid financial advisors hired by Merrill Lynch and that is

F7v4Bluc

1 their primary job responsibility, to give financial advice?

2 MR. MANDEL: In looking specifically at Mr. Blum's and
3 Mr. Harrison's complaint, if you go back to paragraph, 66, one
4 of their primary duties they described as customer service.

5 THE COURT: I have had customer service, as you say,
6 at the pizza parlor, as well as Merrill Lynch. The definition
7 of "customer service," in my dictionary, doesn't say financial
8 advisor.

9 MR. MANDEL: In this context, when you're talking
10 about Merrill Lynch, which is a wealth management company, that
11 is the service they're providing, is to deal with customers and
12 their issues --

13 THE COURT: That's the service that full-fledged
14 financial advisors are providing. I'm trying to figure out
15 where it is the trainees that are being paid to primarily
16 provide financial advice.

17 MR. MANDEL: That is part of the issue with the
18 conditional certification, is the primary duty of how these
19 financial advisors in the development stage are performing
20 their job, it may be different for each person. Some of them,
21 their primary duty is trying to make sales and get clients.

22 THE COURT: No, that's not true.

23 MR. MANDEL: Some of them are providing advice because
24 they already have clients.

25 THE COURT: No, you don't require some to provide

F7v4Bluc

1 advice and some others not to provide advice.

2 MR. MANDEL: Those that have clients are providing
3 advice.

4 THE COURT: I know, but that is not a job requirement
5 I don't think even any of your other employee affidavits say
6 that they are financial advisors who are giving financial
7 advice to clients.

8 MR. MANDEL: No, they do, your Honor.

9 THE COURT: All right. Who says that? And quote that
10 to me.

11 MR. MANDEL: I'm looking at what is document 72, which
12 is the declaration of Donna Joyner.

13 THE COURT: What is attached to that?

14 MR. MANDEL: It is a standalone document. It was
15 filed all by itself.

16 THE COURT: Declaration of?

17 MR. MANDEL: Donna Joyner.

18 THE COURT: Okay, donna Joyner.

19 I have 11 declarations; is that correct?

20 MR. MANDEL: Each better than the last, yes.

21 THE COURT: Donna Joyner, where does she say that her
22 job is to be a financial advisor?

23 MR. MANDEL: Paragraph 8 says, while in the
24 development stage of the PMD program, I estimate that I spent
25 85 percent of my time providing advice to existing clients.

F7v4Bluc

1 THE COURT: Okay.

2 MR. MANDEL: If you read above, paragraph 6, for
3 example, talks about how she obtains an in-depth knowledge
4 about clients' financial profile.

5 THE COURT: Okay.

6 MR. MANDEL: And then she helps determine what
7 financial products are appropriate for that client.

8 THE COURT: You say that every single person who is in
9 this training program is exempt because they all provide
10 financial advice?

11 MR. MANDEL: Not necessarily. What I'm saying is
12 that --

13 THE COURT: How is Blum excluded?

14 MR. MANDEL: Apart from the outside sales exemption --

15 THE COURT: You're saying the plaintiffs don't have a
16 case. In my recollection, this is in furtherance of your
17 motion to dismiss, not in furtherance of your opposition to
18 certification.

19 MR. MANDEL: Well, it is in support of both. On the
20 motion to dismiss, we're relying on Mr. Blum and Mr. Harrison's
21 allegation that one of their primary duties was customer
22 service. In the context of financial services, customer
23 service is an exempt administrative duty. So, in our view,
24 they are exempt under the administrative --

25 THE COURT: Regardless of what the nature of that

F7v4Bluc

1 customer service is? It's got to be financial advice.

2 MR. MANDEL: Correct.

3 THE COURT: You said that there is no other definition
4 in Merrill Lynch of customer service other than providing
5 financial advice.

6 MR. MANDEL: Not that a financial advisor would
7 provide, no.

8 THE COURT: You say Mr. Blum is a financial advisor.

9 MR. MANDEL: Correct.

10 THE COURT: And Mr. Harrison is a financial advisor.

11 MR. MANDEL: Correct.

12 THE COURT: Where does it say that?

13 MR. MANDEL: That Mr. Harrison and Mr. Blum are
14 financial advisors?

15 THE COURT: Yes.

16 MR. MANDEL: They call themselves in their complaint
17 development stage trainees, but within the company and if you
18 look -- actually, at least with respect to Mr. Harrison, we've
19 got -- let's see. I'm sorry.

20 THE COURT: You say all development stage trainees are
21 financial advisors at the time?

22 MR. MANDEL: Yes. Within the company, they are called
23 PMD -- which is practice management development -- financial
24 advisors.

25 THE COURT: Okay.

F7v4Bluc

1 MR. MANDEL: Mr. Swartz was talking about the Reiburn
2 case earlier. So before someone is licensed, they're called a
3 financial advisor trainee because they're not authorized to
4 give financial advice.

5 THE COURT: Are they being paid to give financial
6 advice? Is that the nature of their responsibilities?

7 MR. MANDEL: I'm sorry. The trainees or the --

8 THE COURT: The trainees.

9 MR. MANDEL: The trainees are not. They are training.
10 They are not yet registered and licensed.

11 THE COURT: Aren't these people, trainees --

12 MR. MANDEL: Mr. Blum and Mr. Harrison, they are now
13 financial advisors. They have obtained their licenses, and
14 they are eligible legally and otherwise to provide financial
15 advice.

16 THE COURT: They are no longer trainees?

17 MR. MANDEL: They are not. They are PMD financial
18 advisors.

19 If you look at paragraph 1 of the complaint, it calls
20 them former financial advisor trainees, but that is not
21 accurate within the parlance of the company. They refer to
22 them as PMD financial advisors.

23 THE COURT: Even if a PMD gives no financial advice,
24 they are not required to do so, and if they meet all of the
25 other requirements in terms of their performance during this

F7v4Bluc

1 period of time, they will still get the same salary as a person
2 who may have given financial advice on one occasion or given
3 financial advice on a hundred occasions?

4 MR. MANDEL: They would get the same salary. They
5 would not receive the same incentive compensation or
6 commission.

7 THE COURT: You don't get commission just for
8 providing financial advice. You get commission for making a
9 sale.

10 MR. MANDEL: Right, but oftentimes the financial
11 advice will result in some transaction that triggers a
12 commission.

13 THE COURT: Right. But you're making it broader.
14 You're saying they're exempt not because they're just making
15 sales.

16 MR. MANDEL: Correct.

17 THE COURT: You're saying they are exempt even if they
18 didn't make a sale because they gave financial advice.

19 MR. MANDEL: You were asking whether they would be
20 paid the same. I'm saying, those two people would receive
21 different compensation because one has clients and he is
22 providing him financial advice, he would be receiving some
23 additional compensation as a result of that.

24 THE COURT: Not necessarily.

25 MR. MANDEL: It's true, not necessarily. If someone

F7v4Bluc

1 just calls their financial advisor and says, hey, what do you
2 think about Apple stock, that's not necessarily going to change
3 their commission.

4 THE COURT: Or if I say, you think you ought to buy me
5 some Apple stock and the person says no.

6 MR. MANDEL: Correct.

7 THE COURT: That can qualify as financial advice but
8 you're not generating sales --

9 MR. MANDEL: Correct.

10 THE COURT: -- and it wouldn't generate a commission.

11 MR. MANDEL: Correct.

12 THE COURT: Financial advice doesn't generate a
13 commission; only a sale generates commission.

14 MR. MANDEL: Well, that is not exactly true because
15 some of the financial advisors have accounts where they are
16 managing an entire portfolio, and then they get a percentage of
17 the assets within that portfolio, and then all the advice that
18 they give is encompassed within that.

19 THE COURT: During this three-month period?

20 MR. MANDEL: Yes.

21 THE COURT: I assume that's the exception, not the
22 rule.

23 MR. MANDEL: I couldn't say, but I would assume as
24 much.

25 THE COURT: Okay. Let's wind up.

F7v4Bluc

1 MR. MANDEL: I guess just a couple of other points
2 about the conditional certification. I just want to emphasize
3 that the Second Circuit has said in the Myers v. Hertz case,
4 reaffirming what the U.S. Supreme Court has said, that
5 conditional certification is not a right. Conditional
6 certification is not even contemplated necessarily in the
7 statute itself, and it is certainly not required in every case
8 or even in any case.

9 Conditional certification is a case management tool
10 that is to the Court's discretion when it is appropriate.
11 Based on the diverse circumstances of the different plaintiffs
12 and the opt-ins, potential opt-ins, and the declarations that
13 we have presented, this isn't such an appropriate case.

14 The primary duties of people, as we have discussed, we
15 think are going to differ. The declarations we have submitted,
16 when you look at them compared to Mr. Blum and Mr. Harrison,
17 the primary duties may be different, and even if someone within
18 that, if we start looking at the outside sales exemption, maybe
19 people who qualify for it because they're outside, maybe people
20 that don't because they're inside. The administrative
21 exemption, there may be people who are giving the financial
22 advice who have more clients in this 90-day period, and so they
23 qualify for the administrative exemption because they're akin
24 to full-fledged financial advisors; whereas, someone who
25 doesn't have any clients and isn't providing advice don't

F7v4Bluc

1 qualify for that exemption because they're not really doing
2 that work.

3 THE COURT: I can't see that if the job is the same,
4 if the job description is the same, the duties are the same,
5 and the requirements and the pay is exactly the same and the
6 title is exactly the same. I can't see how you're going to
7 prevail on an argument that even though, in the abstract, if I
8 came to you and asked you to tell me about the job duties and
9 responsibilities and requirements, that you would tell me
10 something that would be uniform to every single person who is
11 in that training period and that they're paid -- other than
12 commission -- their pay is not going to change based on any of
13 these factors. So it is a little awkward to me to try to guess
14 what kind of scenarios you're going to give me that is going to
15 preclude everyone being either, as you say, pretty much kicked
16 out together or pretty much having a claim together.

17 MR. MANDEL: We're not saying that. We're not saying
18 that everybody was classified properly as exempt or everybody
19 was non-exempt. That's the whole point. There is no
20 uniformity. Everybody is different.

21 The point of the collective action or a Rule 23 class
22 action is so that we can ultimately adjudicate all of this in
23 one fell swoop. That is impossible here because the evidence
24 that was already in front of the Court shows there are some
25 people that could qualify for outside sales exemption, there

F7v4Bluc

1 are some people who could qualify for the administrative
2 exemption, and maybe there are others who qualify for no
3 exemption. There is going to be no way to tell short of
4 individual evidence for each person about how they performed
5 their job, where they performed their job, the level of
6 discretion they exercised with respect to the administrative
7 exemption. It is just impossible.

8 There was a court in the Southern District in the
9 Guillen v. Marshalls case, which is 841 F.Supp.2d 797, and it
10 denied conditional certification and noted that it would be a
11 waste of the court's and the litigants' time and resources to
12 notify a large and diverse class only to later determine that
13 the matter should not proceed as a collective action because
14 the class members are not similarly situated.

15 That's precisely what we have here.

16 THE COURT: What are the number of individuals at any
17 given time that's in this three-month period?

18 MR. MANDEL: I think the total group, if you go back
19 three years from now, is a couple thousand people, probably two
20 thousand people.

21 THE COURT: For the whole relevant time period --

22 MR. MANDEL: Yes.

23 THE COURT: -- or at any one given time?

24 MR. MANDEL: No, for the whole relevant time period.

25 THE COURT: It's about two thousand?

F7v4Bluc

1 MR. MANDEL: That's my best estimate.

2 THE COURT: At any given time, how many people would
3 be in the program?

4 MR. MANDEL: Probably a few hundred. I really don't
5 know that off the top of my head. I apologize.

6 THE COURT: I'm just trying to get a feel for it.

7 MR. MANDEL: I think, ultimately, the entire group
8 that we're talking about, if you granted this motion and notice
9 was sent out, it would be to a couple thousand people.

10 As I said, I don't think it is appropriate.
11 Mr. Swartz talked about how it would be unfair to people to not
12 give them notice of this lawsuit. But if there are people out
13 there who already feel like they have somehow been harmed or
14 wronged and they should have been paid overtime, they're
15 certainly free to go find their own lawyer and bring claims,
16 but they haven't. In a case such as this where there is going
17 to be such diverse circumstances --

18 THE COURT: That is the argument to be made in any
19 class.

20 MR. MANDEL: I think it is particularly true here
21 where there are several exemptions that are at issue. There is
22 already evidence before the Court about people performing the
23 job in very different ways that are going to impact the
24 ultimate analysis, and if you look ahead to the ultimate
25 adjudication of this case, there is just no common proof or

F7v4Bluc

1 common evidence that's going to establish that everybody is
2 exempt or everybody is not exempt. It's going to require us to
3 march in two thousand people into this courtroom and put them
4 up there and ask them about their job duties and where they
5 spent their time and how they spent their time. And then we're
6 going to call in their co-workers and their supervisors. And
7 they're going to testify: Oh, no, Mr. Harrison, he was outside
8 all the time. He was always out there meeting with clients and
9 developing business. Or, oh, Ms. Joyner, she was always out
10 there, she was always on the phone talking to clients, giving
11 them financial advice and helping them plan their retirement.
12 It is going to be different for everybody. We're going to have
13 this individual evidence, and there is no way it can be
14 adjudicated on a collective or class-wide basis.

15 THE COURT: As I say, that could be true, but I don't
16 know how you expect me to make that determination now. I don't
17 know if notice is sent out to two thousand people, that they're
18 not going to get three hundred people that say, yeah, I want to
19 be an active participant in this lawsuit because I'm in the
20 same situation as Mr. Blum and Mr. Harrison. I can't guess
21 about that.

22 It would be easier for me to accept your arguments if
23 the specific requirements and guidance about the job duties and
24 responsibilities reflected the differences that you're talking
25 about, but none of that is reflected in the job description.

F7v4Bluc

1 None of those differences are reflected in the job
2 descriptions. I don't know how I am supposed to make that
3 determination that there must be so many people out there who
4 do it differently that most people are not going to qualify as
5 being similarly situated as these individuals.

6 You must admit that if I look at the paper trail in
7 terms of what Merrill Lynch says that these people are supposed
8 to do, there is not a single distinction to be drawn, not a
9 single distinction to be drawn. You don't say, if you want to
10 do it like this, you can; or if you want to do it like this,
11 you can; or you can be an A employee or you can be a B
12 employee. Everything that Merrill Lynch has said is common
13 about what these people are supposed to do and supposed to get
14 paid for, is common across the board.

15 MR. MANDEL: I would not dispute that, but the
16 language is very broad, and it leaves room for a lot of
17 discretion for the individuals to determine for themselves how
18 to perform the job. And in fact, the evidence in front of the
19 Court is that they, in fact, performed the job in very
20 different ways.

21 I'd also just point out that the two documents that we
22 have been talking about, one of them is an incentive plan
23 guide, which is Exhibit C, and one is just one marketing
24 brochure. These are not the official job description, if you
25 will.

F7v4Bluc

1 THE COURT: But you're not disputing that point.

2 MR. MANDEL: I'm not disputing the point that the job
3 description is the same for everybody. If we showed you -- and
4 apparently we didn't put it into the record -- but if we look
5 at the official job description, it would be the same for
6 everybody, and it is in broad terms, and it describes providing
7 financial advice to customers and developing new leads to new
8 customers to whom we're going to provide financial advice and
9 planning. It is very broad, and it leaves room for each
10 individual to figure out for themselves how best to perform the
11 job. As I said, in fact, people do perform the job in very
12 different ways. Some of them perform it in a way that is
13 exempt, and some of them perform it in a way that may be
14 non-exempt. That's the problem with this being a collective
15 action and letting hundreds of people opt in when it just seems
16 so apparent that at the end of the day this is not a case that
17 can be maintained as a collective action. It is going to need
18 to be decertified.

19 THE COURT: I'm not confident that you're going to be
20 able to maintain that argument that you, Merrill Lynch, will
21 prevail because some of the people perform the job in a way
22 that it is exempt and some of the people perform the job in a
23 way that is not exempt. The primary focus is what are the job
24 responsibilities and duties of the job and what is that job
25 classification that they're in.

F7v4Bluc

1 It can't simply be that we told everybody to do it one
2 way but people do it a lot of different ways, so therefore
3 we're exempt from the labor laws --

4 MR. MANDEL: Well --

5 THE COURT: -- because they get to define whether
6 their job is a different job than somebody else's.

7 MR. MANDEL: Well, they don't.

8 THE COURT: You may get to define it or the law may
9 get to define it, but the individual employee doesn't get to
10 define it.

11 MR. MANDEL: If we flip it on its head and say the
12 company -- let's go back to the McDonald's analogy -- and the
13 company says, we're hiring you as a manager, and here's the job
14 description. We want you to manage employees and hire and fire
15 and do all the quintessential managerial jobs, and then that
16 person goes out and, instead of managing, what are they doing
17 all day? They're selling fries. And they're not actually
18 managing everybody. That person would be non-exempt
19 notwithstanding that what the duties of the job are supposed to
20 be is management.

21 I don't think that the plaintiffs would dispute that,
22 that it is not what the company says the job is, it is what the
23 individuals actually do. That is what is determinative.

24 THE COURT: It is what that job is that the person is
25 being paid to do. That's how it is defined. You can't just

F7v4Bluc

1 define by it depends on what it is they do. No, it doesn't
2 depend on what it is that they do. If you hire me as a
3 salesperson and I decide that I want to do something else and I
4 go to another unit, it is still the question of, okay, what
5 were you hired as. You would even be making that argument.
6 You would not make the argument that if you hired somebody as
7 an exempt salesperson, that because they were doing some other
8 stuff that was not what you paid them to do and that they were
9 authorized to do. That is not a good example. I'm going to
10 take that example back. It is not as if they're doing
11 something unauthorized to do.

12 But it can't be as fluid as you want to argue it. It
13 can't be that simply I hired them to do this, these are the job
14 requirements, this is what we require everybody to do, but we
15 give them leeway to figure out how they want to do it. So,
16 therefore, the people who take the leeway to do it in a way
17 that we can argue that it is exempt, that exempts that job.
18 No, it doesn't exempt that job. It may determine whether that
19 individual person is a member of a class, if you say that that
20 individual person is doing something different than what you
21 described as the job. And you would agree that nothing about
22 the description of the job and the duties that are required
23 that necessarily makes an employee who is doing that job
24 exempt.

25 MR. MANDEL: No, I would not agree with that.

F7v4Bluc

1 THE COURT: Give me one example of what it is that is
2 written in the job description that makes everybody who does
3 that job exempt?

4 MR. MANDEL: Again, I want to apologize because the
5 formal job description I don't believe is in the record.

6 THE COURT: I'm just going off what is in front of me.

7 MR. MANDEL: I understand that.

8 THE COURT: I have about a foot of paper here. If you
9 tell me something is missing, I'm sorry, there is nothing I can
10 do with what's missing. I assumed you gave me as complete a
11 record as you wanted me to review --

12 MR. MANDEL: I would be happy, if we could -- the job
13 description itself is one page --

14 THE COURT: Give me an example.

15 MR. MANDEL: The job description itself, the formal
16 job description for the position, says that they are to provide
17 financial advice and consultation, and that would render them
18 exempt under the administrative --

19 THE COURT: For this period of time.

20 MR. MANDEL: Correct.

21 THE COURT: I don't have that in front of me.

22 MR. MANDEL: I would be happy to supplement and
23 provide that to the Court Monday or as soon as possible.

24 THE COURT: I mean, it doesn't resolve the dispute,
25 though. It doesn't resolve whether or not they are, in fact,

F7v4Bluc

1 providing that and the majority of people are providing that
2 and are providing it on a level which would define their job as
3 opposed to being a minor incidental part of their job.

4 I would be shocked if the evidence would demonstrate
5 that most of these employees during this period of time are
6 generating significant commissions on any significant number of
7 sales and that that is a significant part of what is being
8 accomplished during this period of time. I would be shocked.
9 Maybe you will demonstrate that. Nothing in these papers would
10 give me that impression. It is not even the goal of this
11 training period.

12 All right. Okay. So let's wind up.

13 Did you have anything else that you wanted to add?

14 MR. SWARTZ: Nothing further, your Honor.

15 Thank you.

16 THE COURT: As you can tell, I'm not convinced.

17 MR. MANDEL: You were talking to Mr. Swartz, right?

18 THE COURT: No, unfortunately, I'm talking to you.

19 I'm going to have to deny the motion to dismiss. I
20 think the allegations that Blum and Harrison make are
21 sufficient allegations to, at most, for the defense to raise a
22 factual dispute that cannot be resolved on the motion as you
23 have made it. I cannot say as a matter of law that the
24 allegations that they make are not plausible allegations that
25 they themselves were employed in a circumstance in which their

F7v4Bluc

1 claims might be supported if they were to demonstrate those
2 facts. I think the disputes about what the real jobs are and
3 the job responsibilities and who does what, I think that those
4 are factual issues that have to be resolved.

5 At this point, also, I think that this litigation has
6 gotten to the point where it is appropriate for conditional
7 certification. I can always decertify it if the facts
8 demonstrate otherwise. As I say, the job responsibilities of
9 most people during this training program seem to be common
10 enough that it would implicate that a significant number, if
11 not all of these plaintiffs, may be similarly situated and
12 there their claims may rise or fall based on the same evidence.
13 And whatever distinctions, if it turns out that there is such
14 significant variations in terms of the activities involved
15 during this three-month period, then that can be addressed.
16 But given the fact that this is still part of the training
17 program and only for a three-month period and the goals and
18 objectives, particularly primarily relating to training and
19 related to what is the minimum responsibilities during this
20 period of time for which they are being paid, there is no
21 reason to believe that somehow this is somehow much more
22 sophisticated a job task than what it apparently appears to be,
23 a training program to prepare people to ultimately be
24 full-fledged financial advisors and generate a book of business
25 once they are fully trained and fully prepared to be financial

F7v4Bluc

1 advisors, and they're not during this period of time. And the
2 purpose of this period of time is, not to make them do that in
3 this period of time, it is to train them and have them
4 demonstrate some minimum abilities that would ultimately serve
5 them to be successful financial advisors when they completed
6 the program.

7 I think whether they're licensed or not licensed at
8 this point in time is not determinative in terms of the
9 commonality. Most probably are licensed, but I can't
10 articulate any great distinction at this point that is expected
11 or is the responsibility of people in the training program that
12 one is expected to perform more, less, or in a different manner
13 than anyone else. And I think what is characterized as the
14 general or vagueness of some of the guidelines, at this point I
15 can only conclude that they are general vague guidelines
16 because that is all the job really requires and expects at this
17 point in time. So I can't really articulate the significant
18 legal distinctions that would take this out of a situation
19 where there is likely a large group of people who are similarly
20 situated who may have the same claim. It may be a valid claim.
21 But if it is not a valid claim, for most of these people,
22 particularly when we're talking about opt-in plaintiffs, most
23 of these people, they will rise and fall pretty much on the
24 same general evidence about the nature of the job
25 classification that they're all in during this period of time.

F7v4Bluc

1 Again, this is not inconsistent with the position that
2 Merrill Lynch took, as I said, in California, when they said
3 they wanted to certify a larger class of people for settling
4 purposes. But at this point, I make no determination as to
5 whether or not I think that there is some compelling evidence
6 that would indicate that the plaintiffs, any opt-in plaintiffs,
7 are ultimately going to prevail. They may or may not prevail,
8 but I think given the nature of the job duties,
9 responsibilities, guidance in terms of what they're supposed to
10 accomplish during this period, requirements of what they're
11 supposed to accomplish during this period, I think that there
12 is significantly more that these employees at this point
13 demonstrated they had in common relative to what their
14 appropriate pay is supposed to be than distinctions about how
15 they might have individually performed their job, even though
16 the company itself makes no distinction in terms of job title
17 or job classification, job duties and responsibilities and
18 accomplishments during this period of time or pay among any of
19 these employees that would somehow make me hesitate at this
20 point to say that, as I say, that there appear to be a
21 significant number of individual plaintiffs who may be in the
22 same boat. Now, whether that is going to be all two thousand
23 is not the question. Whether there is going to be numerosity
24 may be the question, and whether or not they're really going to
25 have any significant number of opt-ins once they have received

F7v4Bluc

1 notice is another question.

2 So I think it is appropriate for conditional
3 certification and notice at this time and for discovery to move
4 forward to resolve this issue, at least to consider whether or
5 not there really is a class to be certified. I think the
6 parties can move forward as quickly as they can, if they want
7 to resolve that issue, to resolve that issue.

8 I'm going to grant that application at this point.
9 I'm not going to work on the details of what information should
10 be provided from the defense or the requirements or language of
11 the notice at this point. What I'm going to is I'm going to
12 refer to Magistrate Judge Francis to work out the details, what
13 information should be provided, the kind of notice, extent of
14 the notice, language of the notice that should go out. And
15 then I'm going to ask him also to coordinate and supervise the
16 schedule for moving forward with discovery in this case. I
17 will let him resolve those issues. I will make that referral
18 to him today, and you should hear from him within the next week
19 or two. If not, contact his chambers directly and try to
20 consult with each other first, and then be prepared to tell him
21 where you agree or disagree with regard to the process moving
22 forward.

23 My understanding is, I think the other case that was
24 referred to me, Reiburn, is scheduled for October 8th, I
25 believe, at 9:30. I'm going to adjourn this to that same time.

F7v4Bluc

1 If we don't need to meet on that day, you can give me a letter
2 as to what the status is.

3 Are the same set of lawyers representing the parties
4 in that case?

5 MR. SWARTZ: Yes, your Honor.

6 MR. MANDEL: Yes, your Honor.

7 THE COURT: I don't know if Judge Francis is the
8 magistrate judge who is assigned on that case. See if you can
9 coordinate how you want to proceed with both cases. I don't
10 know whether or not it is appropriate for consultation or
11 whether or not Reiburn -- I haven't had a chance to look at it
12 carefully -- I don't know whether that is a similar set of
13 class action allegations or an individual claim. Obviously, to
14 the extent that it is the same as here, it makes no sense for
15 both cases to go separately or the plaintiffs conditionally
16 certified to be the same class. It makes more sense for those
17 cases to be consolidated, but I will contact Judge Francis
18 first.

19 Also, I will make a referral for settlement if you
20 want to use him for that purpose, too, but I will leave that up
21 to you as to whether you want to engage in that early on with
22 his assistance. Otherwise, I would like to have him resolve
23 the issues with regard to the notice and providing information
24 for appropriate notice, and then you can move forward with
25 that. Then, I will see all the parties on October 8th in both

F7v4Bluc

1 cases unless I get a letter from you requesting adjournment on
2 that date and give me an update as to what the status is.

3 MR. SWARTZ: One housekeeping matter, please. Is your
4 Honor referring the matter to Judge Francis for all pretrial or
5 just the notice process?

6 THE COURT: At this point, I think I'm going to go
7 ahead and refer it to him for all pretrial. I want him to set
8 a schedule for discovery, and give him the flexibility, if you
9 want to use him for settlement and to resolve the issue of
10 notice as quick as possible. I will talk to him about it
11 today.

12 MR. SWARTZ: Thank you, your Honor.

13 THE COURT: You're welcome. Thank you.

14 MR. MANDEL: Thank you, your Honor.

15 (Adjourned)
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